86-1334

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

JOHN M. SKEVIN,
Petitioner,

v.

SUPREME COURT OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether a state Supreme Court, consistently with Due Process, may *automatically* disbar an attorney without regard for or inquiry into his current character and fitness to practice law where said attorney is found to have knowingly misappropriated client funds under a greatly reduced standard of knowledge?

2. Whether a State Supreme Court, consistently with Due Process, may *conclusively* presume that an attorney is guilty of *knowing* misappropriation of client funds on the basis of a record showing no intent to defraud or steal but simply revealing shortages in the attorney's trust account at certain moments in time?

3. Whether a State Supreme Court, consistently with Due Process, may disbar an attorney where, prior to that Court's order, its agents cause or permit extensive breaches of confidentiality in the disciplinary process thereby triggering pervasive, statewide adverse publicity and where the Court concedes that in sentencing attorneys convicted of disciplinary violations the Court deems determinative its institutional need to maintain a good public image?

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OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at *Matter of Skevin,* 104 N.J. 476 (1986). [The Opinion appears as *Appendix A.*]

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JURISDICTION

The judgment of the New Jersey Supreme Court disbarring the petitioner, John M. Skevin, was entered on November 14, 1986. [The Order of disbarment appears as *Appendix B.*] This petition for certiorari has been filed in this Court within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment, United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J. Ct. R. 1:21-6 provides in pertinent part:

> Every attorney who practices in this state shall maintain in a financial institution in New Jersey * * *:
>
> (1) a trustee account or accounts, separate from any business and personal accounts, and from any fiduciary accounts * * *, into which trustee account or account funds entrusted to the attorney's care shall be deposited; and

(2) a business account into which all funds received for professional services shall be deposited.

Other than fiduciary accounts * * *, all trustee accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account."

[The full text of *N.J. Ct. R. 1:21-6* appears as *Appendix C*]

Disciplinary Rule ("DR") 9-102(A) provides:

All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, and all escrow funds, shall be deposited in one or more identifiable bank accounts maintained in this State, and no funds belonging to the lawyer or law firm shall be be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client, a portion of which the lawyer or law firm will be entitled to receive for his own use must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

N.J. Ct. R. 1:20-10(a). Confidentiality provides as follows:

(a) All proceedings conducted and records made pursuant to R. 1:20 shall be confidential and shall not be disclosed to or attended by anyone except as authorized by these rules or as provided by the Supreme Court and as follows:

(1) on the scheduling of oral argument for final discipline by the Supreme Court, in which event the recommendation of the Board that is the

subject thereof, together with any briefs filed pursuant to an order of the Court shall be made public; or

(2) at the request of or with the consent of the respondent and upon the ultimate determination of any disciplinary proceeding; or

(3) on the entry of final orders of the Supreme Court in respect of disciplinary matters; or

(4) upon the order of the Supreme Court.

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STATEMENT OF THE CASE

This case arises from the disbarment of petitioner, John M. Skevin, by the New Jersey Supreme Court. On December 23, 1986, the United States Supreme Court per Justice William Brennan, Jr. issued a stay of the lower court's disbarment order, following submission of briefs by petitioner and the respondent. Justice Brennan's stay is in effect pending adjudication of this petition for certiorari. Justice Brennan's Orders appear herein as *Appendix D.*

1. The Nature of the Ethics Charges Against John Skevin.

On March 29, 1983, the Bergen County District Ethics Committee[1] [hereinafter the "Committee"], served a com-

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[1]In *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982), this Court had occasion to describe New Jersey's attorney ethics system. In that opinion, the Court accurately observed that the system is three-tiered:

(Continued on following page)

plaint upon John Skevin, the petitioner, initiating ethics proceedings against him. That complaint was instigated by Mr. Skevin's former client, Marie L. Dodd.

Soon after filing the *Dodd* complaint, the committee filed an amended complaint charging, *inter alia*, various ethics violations at the instigation of several other former clients.

On November 14, 1986, the New Jersey Supreme Court dismissed all of the charges brought against Mr. Skevin by his clients or declared them to be so *de minimus* as to require only a private reprimand.[2]

In the course of investigating these minor client matters, the New Jersey Office of Attorney Ethics [hereinafter the "OAE"] decided to audit John Skevin's law firm financial records. That audit revealed, and indeed petitioner has candidly admitted throughout the proceedings below, that from 1981 through 1983, Mr. Skevin de-

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(Continued from previous page)

The lowest level is the District Ethics Committee, a countywide body that initiates investigations on behalf of the Supreme Court of New Jersey. The intermediate level is the Disciplinary Review Board, a statewide body that adopts, modifies or rejects the Committee's findings and makes a recommendation for discipline to the Supreme Court of New Jersey. The upper level is the state Supreme Court itself, the body that, relying upon the factual findings of the lower bodies, see *id.*, 457 U.S. at 434 n. 13, issues a judgment imposing discipline.

[2]The *Dodd* matter did "not . . . warrant . . . disciplinary action." *In the Matter of Skevin*, (Supreme Court of New Jersey, D-2-86, decided, November 14, 1986, submitted herewith as Appendix A) at 3; the *Schrader* matter amounted to "conduct for which a private reprimand would constitute adequate discipline," *id.* at 5; the *Onello* matter was outright dismissed, *id.* at 6; and the *Santana* matter was deemed to warrant a private reprimand, *id.* at 7.

posited in the trust account he maintained for his clients large sums of his own money earned in various real estate transactions he handled *pro se*. Although none of Mr. Skevin's clients claimed that he had deprived them of trust funds held in escrow—indeed it is undisputed that all of Mr. Skevin's clients received their due from the trust account—the OAE audit revealed that at certain points in time during the years 1982 and 1983, the balance in the trust fund was less than the amount of trust monies Mr. Skevin was responsible for as reflected in his trust account ledger sheets.

On the basis of the OAE audit, the Committee itself charged Mr. Skevin with various offenses including the knowing misappropriation of client trust funds.

2. The Decision of the Supreme Court of New Jersey not to temporarily suspend Mr. Skevin and his good standing as an attorney during the two years this ethics matter was processed.

In March of 1984, the OAE moved before the Supreme Court of New Jersey, for an order temporarily suspending Mr. Skevin pending proceedings against him. The Supreme Court denied that motion on July 12, 1984. The Court permitted Mr. Skevin to continue to practice law under the supervision of another New Jersey attorney, Raymond L. Flood.

No ethics complaints were filed against Mr. Skevin arising out of matters during the years 1984, 1985 and 1986. Indeed, in connection with proceedings before the Supreme Court of New Jersey against Mr. Skevin, his court-appointed proctor filed an affidavit declaring, *inter alia*, that "In the course of the past year that I have served as Mr. Skevin's proctor, I have observed him profession-

ally and personally. Mr. Skevin appears to be a competent professional, providing good quality services to his clients. Mr. Skevin's legal files appear to be well organized and he obtains good results for his clients which primarily involve negligence actions." *That affidavit was uncontroverted* and appears herein as *Appendix E.*

3. Prejudicial publicity against Mr. Skevin during the pendency of this ethics matter and violations of confidentiality rules by the New Jersey ethics system.

As noted above, the initial ethics complaint in this matter was served on March 29, 1983, and the matter was tried before a special master, retired Judge Ward J. Herbert, on July 10, 12, 15 and 16, 1985. The special master's report was submitted under date of March 12, 1986.

Under New Jersey Court Rules, ethics proceedings are to be kept strictly confidential. That rule was grossly breached in these proceedings.

On June 8, 1984, an article appeared in *The Star-Ledger,* a statewide New Jersey daily, titled "SUSPENSION OF ATTORNEY ASKED PENDING ETHICS HEARINGS" and sub-titled "EX-LEGISLATOR ACCUSED OF MISUSING CLIENT TRUST FUNDS." [Newspaper articles cited herein appear as *Appendix F.*] That article, although not in violation of confidentiality rules, because it was based upon a public hearing before the Supreme Court on the issue of temporary suspension, was nevertheless the first of a series of highly prejudicial press stories.

On August 26, 1984, an article appeared in the *New York Times* titled "EX-STATE SENATOR FACES

ETHICS INQUIRY." The article cites statements by Thomas McCormick, Chief Hearing Officer of the OAE and David Johnson, OAE Director, that "Mr. Skevin is charged with misappropriating $150,000.00 in client funds." The article referred at length to details of the *Schrader* case and documentary evidence involved in that matter.

On August 13, 1985, shortly after hearings before the special master, but prior to the issuance of his decision, *The Bergen Record* featured an article entitled "ETHICS UNIT MAY SEEK DISBARMENT OF SKEVIN." The article quoted OAE staff: "The State office of Attorney Ethics may seek to have Hackensack attorney John M. Skevin disbarred, said an official who recently prosecuted Skevin for misconduct. 'I want this guy to get what he deserves, at least in my opinion,' said [Thomas J.] McCormick who presented the case against Skevin at the hearing . . . 'We believe Skevin was using the trust account as his personal bank,' said McCormick . . ."

On September 3, 1985, special master Ward Herbert issued a letter to the OAE and Mr. Skevin's counsel saying, "I hardly need to tell you that *I was shocked by the newspaper article of August 13th* [*1985*]. It is the sort of thing that eliminates much, if not all, of the meaning out of Rule 1:20-5(d)." On May 6, 1986, shortly after the special master issued his findings and conclusions, Herb Jaffe, a leading columnist for *The Star-Ledger* published a column complaining about the delays in the ethics system and calling for Skevin's disbarment. *Mr. Jaffe quoted extensively from the confidential report of the special master*, which obviously had been leaked to him

from within the ethics system. Mr. Jaffe concluded his article by complaining about the delay in disbarring Mr. Skevin and noting sarcastically "And they say the lawyer ethics system instills the public with confidence."

On May 6, 1986, Special Master Herbert wrote to the Director of the OAE complaining about the leak of his confidential report to *The Star-Ledger* and noting that he had forwarded copies of the report only to ethics system personnel and Mr. Skevin's counsel.

On May 31, 1986, *The Star-Ledger* headlined "DISBARMENT ASKED FOR FORMER LEGISLATOR," and quoted extensively from the report of the Disciplinary Review Board [hereinafter "DRB"], the intermediate disciplinary body that received Judge Herbert's report and in turn made recommendations to the Supreme Court of New Jersey in its own confidential report.

On June 1, 1986, *The Record* headlined "SKEVIN: FROM CLOUT TO LIKELY DISBARMENT," and likewise quoted extensively from the DRB report.

On June 22, 1986, *The Star-Ledger* ran another Herb Jaffe article on the front page of its Opinion/Business section entitled "NO EXCUSES FOR LAWYERS WHO VIOLATE CLIENT TRUST." The article praised recent disbarments and referred to the Supreme Court's scheduled argument on the *Skevin* matter. Again, the newspaper quoted at length from the DRB Report.

4. Proceedings against Mr. Skevin by the Committee, the DRB and the Supreme Court of New Jersey.

During the hearing before Judge Herbert, Mr. Skevin admitted that he had permitted some of the earnings from

his *pro se* real estate transactions to pass through and mix with his trust account funds. He conceded that from time to time he advanced to himself and his clients payments due himself and his clients prior to actual receipt of settlement proceeds. Mr. Skevin testified that he believed that such advances were being funded by the large personal deposits he had placed in his trust account. He did not believe that such advances invaded the trust monies held on account of other clients.

Judge Herbert struggled with the question of whether or not Mr. Skevin had *knowingly* invaded client trust funds and concluded that there were at least two occasions on which the trust account balance was sufficiently low to have alerted Mr. Skevin to the fact that he had exhausted his personal funds and that therefore client trust funds were at risk. On that basis, Judge Herbert concluded that Mr. Skevin had knowingly misappropriated client trust funds.

In his Report and Presentment to the Disciplinary Review Board, [hereinafter the "DRB"], Judge Herbert did *not* recommend disbarment. He ruled only that he found Mr. Skevin guilty of unethical conduct "for which a private reprimand does not constitute adequate discipline."

The DRB, a body consisting of laypersons and attorneys, substantially adopted Judge Herbert's factual findings. They recognized that the "crucial issue [in the case] is respondent's mental state at the time of the misappropriation." They disregarded Mr. Skevin's substantial claims that the invasion of trust funds was an unintentional product of poor accounting and further disregarded Mr. Skevin's claim that his financial neglect was

the result of severe medical crises suffered by him and his immediate family during the time period in question.

The DRB did not even consider the question of whether the petitioner was, at the time of the DRB decision, May 23, 1986, morally and professionally fit to practice law in the State of New Jersey. They concluded that because Mr. Skevin had, in their view, knowingly misappropriated client trust funds in 1982 and 1983, therefore, disbarment was automatically required.

In reviewing the DRB decision, the Supreme Court of New Jersey relied upon and adopted the factual findings of Judge Herbert and the DRB. [See *Appendix A*]

In its opinion, the New Jersey Supreme Court, *for the first time* adopted a definition of "knowledge" from the New Jersey criminal code, N.J.S.A. 2C:2-2b(2), where true knowledge is not required but rather, "a party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist." Applying that newly reduced standard to petitioner, the Court concluded that Mr. Skevin's advances to himself and his client "posed an at least realistic likelihood of invading the accounts of another client . . ." and found, therefore that Mr. Skevin had knowingly misappropriated client funds. [App. 12]

The Court conceded that Mr. Skevin had credibly demonstrated "extraordinary [personal] suffering" during the period in which the trust accounting problems arose. The Court noted, however, that in cases of knowing misappropriation, it has an "inflexible" rule mandating disbarment. [App. 15]

In ruling, the New Jersey Supreme Court indicated that it was "deeply troubled" by the "apparently deliberate breach of the confidentiality of the disciplinary proceedings." The Court noted that "if only private parties were involved, dismissal might be appropriate; but the fact that there was a public interest involved tipped the balance so as to preclude dismissal." [App. 13-14]

The Court made no determinations whatsoever about Mr. Skevin's present moral or professional fitness to practice law. Although the issue of violations of federal due process was briefed by petitioner's counsel below, in its opinion, the Court ignored all such issues and implicity overruled them. [See generally *Appendix A*]

REASONS FOR GRANTING THE WRIT

I. This case squarely presents the grave constitutional infirmities of In Re Wilson, 81 N.J. 451 (1979), a case being explicitly adopted by high state courts throughout the nation.

This case presents this Court with an opportunity to stem a nationwide multiplication of constitutional error that is following in the wake of *In Re Wilson*, 81 N.J. 451 (1979). That case compelled the automatic disbarment of the petitioner despite his uncontroverted current moral and professional fitness to practice law. It compelled also the conclusive presumption that simply because petitioner's trust account showed deficient funds at certain points in time, and because petitioner inferentially was aware of one such moment of deficiency, therefore, petitioner *knowingly* misappropriated, i.e. stole, trust funds.

In re Wilson, supra, holds that where an attorney "knowingly use[s] his clients' money as if it were his own . . . disbarment is the only appropriate discipline." *Id.*, 81 N.J. at 453.

John M. Skevin, the petitioner, was *automatically* disbarred under the *Wilson* rule, following determination that he had knowingly misappropriated client funds. By automatically stripping Mr. Skevin of property protected by the Fourteenth Amendment, i.e. his license to practice law, see *Barry v. Barchi,* 443 U.S. 55, 69-70 (1979) (Brennan, J. concurring), the New Jersey Supreme Court ran afoul of long-standing precedent in this Court.

In *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232 (1957), this Court held that a person may not be excluded from bar admission unless he lacks good character, or is professionally unfit. Ignoring such traits in evaluating qualifications for bar membership, the Court held, amounts to a violation of the Due Process Clause of the Fourteenth Amendment. There, this Court, having granted certiorari to review a state judgment excluding a person from bar membership, found no evidence of "moral turpitude", *id.* at 242, and found that "[i]n the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies . . . cannot be said to raise substantial doubts about his present and good moral character," *id.* at 246. Finding "no evidence in the record which rationally justifies a finding that [petitioner] was morally unfit to practice law," *id.* at 246-47, this Court reversed and remanded the matter.

Under *Wilson, supra,* the constitutionally compelled inquiry of *Schware* into an accused's character and fitness is

held to be irrelevant. In *Matter of Noonan,* 102 N.J. 157 (1986), a case decided just months prior to the New Jersey Court's ruling against the petitioner, the Court interpreted *In re Wilson, supra,* to mean that *any* invasion of trust funds for virtually *any* reason will mean automatic disbarment. It "is not so" the Court ruled "that some kind of intent to defraud . . . is required . . . *The presence of 'good character and fitness,' the absence of 'dishonesty, venality, or immorality'—all are irrelevant,*" the Court declared, *id.* at 160. (Emphasis supplied)

In other contexts, this Court has always held against judicially ordered forfeiture of property or liberty unless a court first finds some degree of fault or venality by the person to be punished.

For example, in *Bell v. Burson,* 402 U.S. 535 (1971), Justice Brennan, writing for a unanimous Court including four justices now sitting, reviewed, on certiorari, a Georgia motor vehicle procedure whereby uninsured motorists suffered temporary suspension of their licenses if they were involved in an accident, unless they posted a bond equal to the amount of damages claimed by aggrieved parties in accident reports. Just as the Supreme Court of New Jersey has declared fault to be irrelevant or presumed, once an invasion of trust funds is established, so the Georgia system held that " 'fault' or 'innocence' are completely irrelevant factors", *id.* at 537, in decisions to suspend licenses. Citing the bar admission case, *Willner v. Committee on Character,* 373 U.S. 96 (1963), Justice Brennan wrote that "we look to substance, not to bare form, to determine whether constitutional minimums have been honored," *id.* at 541, and found the Georgia system to have violated the Due Process Clause of the Fourteenth Amend-

ment because it granted no real hearing on the issue of the motorist's fault.

In effect, by automatically disbarring an attorney upon his or her conviction for knowing misappropriation, the New Jersey Supreme Court conclusively, i.e. irrebuttably, presumes moral and professional unfitness to practice law on that basis of that conviction alone. Moreover, the New Jersey Court, under *In re Wilson, supra,* conclusively presumes that if an audit reveals that an attorney is "out of trust" at some point in time, then the attorney has "knowingly" misappropriated, i.e. stolen, client funds. In *In re Harrison,* 461 A.2d 1034 (D.C. App. 1983) the District of Columbia Court of Appeals, adopting *In re Wilson's* conclusive presumption of corrupt "knowledge" (although declining *Wilson's* automatic disbarment) wrote that New Jersey's

> "definition [of knowing misappropriation] makes clear that improper intent is not an element to be considered in determining whether there has been a misappropriation. This is consistent with the language of DR9-102 which, unlike other discipinary rules, does not require scienter; rather it is essentially a per se offense. Consequently, once the running balance of [the attorney's] office account fell below the amount held in trust for [the client], misappropriation had occurred."

In re Harrison, supra, 461 A.2d at 1036.

Here, too, because petitioner's trust account fell "out of trust" he was conclusively presumed to have misappropriated clients' funds. Such conclusive presumptions of both unfitness to practice law and "knowledge" have always been condemned by this Court as violative of Due Process.

In *Morissette v. United States*, 342 U.S. 246 (1952) this Court condemned precisely the kind of reasoning that has emerged from *In re Wilson, supra.* There, the Court forbade the presumption of criminal intent from the mere fact that a person was found in possession of government property. Here, too, the mere fact that trust funds were, at points in time, unaccounted for cannot give rise to a presumption of corrupt "knowledge." Nor can a conviction of knowing misappropriation, itself moored upon a fatally flawed determination of knowledge, give rise to a presumption that one is unfit to practice law.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), this Court, following *Morissette, supra*, prohibited the conclusive presumption of "knowing" or "deliberate" homicide from the simple fact that a person killed another. The Court ruled such a presumption constitutionally defective just as it ruled analogous presumptions constitutionally defective in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Under all the foregoing cases, the New Jersey Court's presumption that petitioner acted with corrupt knowledge and its presumption that he is unfit to practice law were no substitute for a constitutionally mandated evaluation of his current character and fitness, *Schware, supra*, and his actual state of mind at the time he was out of trust, *Morissette, supra.*[3]

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[3]cf. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) condemning the automatic defrocking of a priest for aiding the confederacy and *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866) condemning the *ex post facto* disbarment of attorneys who had supported the confederacy.

Unfortunately, the automatic approach of *In Re Wilson* is spreading throughout the nation. We have already noted the partial adoption of that case in the District of Columbia. Also, the Court should take note of *Matter of Marks*, 72 A.D.2d 399, 424 N.Y.S.2d 229 (1980) citing *Wilson* at 424 N.Y.S.2d at 230; *State, ex rel., Oklahoma Bar Association v. Raskin*, 642 P.2d 262 (Okla. 1982) citing *Wilson* at 267-68; *Matter of Discipline of Okerman*, 310 N.W.2d 568 (Minn. 1981) citing *Wilson* at 571. *Wilson* has been cited in unpublished decisions in Maine, Texas and the District of Columbia; See, Johnson, *Lawyer, Thou Shall Not Steal*, 36 Rutgers L. Rev. 454 (1984) at 486.

This Court has not hesitated to grant certiorari to correct substantial constitutional errors in the context of attorney admission and discipline. See *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (reversing state denial of bar admission where the lower court failed to prove that petitioner was "morally unfit to practice law," *id.* at 273); See, also, *Willner v. Committee on Character*, 373 U.S. 96 (1963) (on certiorari to the New York Court of Appeals reversing state denial of bar admission where petitioner was deprived of fair opportunity to prove his character and fitness); *Spevack v. Klein*, 385 U.S. 511 (1967) (on certiorari to the New York Court of Appeals reversing disbarment of attorney because he had asserted the Fifth Amendment); *In re Ruffalo*, 390 U.S. 544 (1968).

Certiorari should be granted in order to stem a nationwide violation of attorney Due Process rights. This case is an excellent vehicle for righting the errors below because here, it is uncontroverted that petitioner's character and fitness at the time of his disbarment was good. See the Affidavit of Raymond Flood, Esq., petitioner's Court-

appointed proctor, *Appendix E.* Thus the constitutional deficiencies associated with automatic disbarment are sharply presented.

II. This case presents a substantial, novel, and undecided issue of federal constitutional law that must be decided in order to preserve the integrity of state bar disciplinary proceedings.

Another reason for granting certiorari in this matter is because a novel and substantial issue of procedural due process has been implicated by the proceedings below. This Court has already ruled that where a criminal jury trial is infected with excessive pre-trial and trial publicity, due process requires vacation of the conviction and retrial. *Sheppard v. Maxwell,* 384 U.S. 333 (1966). This Court has recognized also that judges as well as jurors may be influenced and pressured by excessive press coverage of court proceedings. In *Pennekamp v. Florida,* 328 U.S. 331 (1946) Justice Frankfurter (concurring) wrote that "To deny that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels. . . . 'Trial by newspaper,' like all catchphrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country." *Id.* at 359.

This case poses the unanswered question of whether "trial by newspaper" violates the integrity of state bar disciplinary proceedings in a manner contravening the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Here, the Supreme Court of New Jersey conceded that it was "deeply troubled" by the "ap-

parently deliberate breach of the confidentiality" of the proceedings against Mr. Skevin. In *Wilson, supra,* the Court frankly admitted that it sought harsh penalties for misappropriation in order to preserve its public image and to maintain "public confidence." *id.* at 81 N.J. 456.[4] Given the press clamor for Skevin's disbarment, the Court had no choice but to disbar him. In *Matter of Dondi,* 63 N.Y.2d 331, 472 N.E.2d 281, 482 N.Y.S.2d 431 (1984), New York's highest Court found a confidentiality breach in roughly analogous circumstances to violate federal due process. This Court should find likewise. See also, *Florida Bar v. Rubin,* 362 So.2d 12 (Fla. 1978).

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[4]It is indeed apparent that the New Jersey Supreme Court *must* have been influenced by the confidentiality breaches and resultant publicity in this case. Just seven months prior to the disbarment of petitioner, an attorney was found guilty of the following ethics violations: improper use of a trust account by maintaining a miscellaneous account and a tax reserve account as part of his clients' trust account; misuse of funds in this trust account in five specific cases; two counts of failing to maintain his financial books and records as required by Court Rules; ten counts of engaging in conduct that adversely reflected on his fitness to practice law; and ten counts of not properly preserving the identity of funds of a client. To say the least, the gross neglect of the attorney at issue prejudiced his clients. Some examples of his negligent representation include: failing to perfect a criminal appeal; failing to file suit and thereby exceeding the statute of limitations; and failing to properly administer two estates.

In the face of such overwhelming evidence of misconduct that severely prejudiced his clients, and such abundant evidence of unfitness to practice law, the New Jersey Supreme Court found that a *temporary suspension for less than five (5) years* was sufficient discipline. *Matter of Noonan,* 102 N.J. 157 (1986). Only the Court's sensitivity to press coverage of the *Skevin* matter can explain why he received disbarment while Mr. Noonan received only suspension.

III. The foregoing issues of Due Process were presented to the Court below.

Prior to issuance of the New Jersey Supreme Court decision in this matter, petitioner's counsel showed a prescient concern with the Due Process implications of *In re Wilson.* Citing two Due Process cases, *In re Arndt,* 67 N.J. 432 (1975), a case that adopts *Bell v. Burson,* 402 U.S. 535 (1971), and *Erdman v. Stevens,* 458 F.2d 1205 (2d Cir. 1972) *cert. den.* 409 U.S. 889, petitioner's counsel analogized disbarment to imposition of a criminal penalty and argued that such a penalty could be justified only by a finding of professional unfitness or substantial evil-mindedness. [Petitioner's Brief below at 34, 35 and 42]. "If the reasoning of the DRB is followed," petitioner's counsel wrote, "it will represent a substantial departure from current law, *and a reckless disregard for the due process rights of attorneys who come before them for discipline.*" [*Id.* at 42]. Paralleling the reasoning of *Morissette, supra,* petitioner's counsel condemned "a presumption of guilt" by the disciplinary system and reminded the Court that an "attorney is innocent until proven guilty." Petitioner's counsel called upon the New Jersey Court to carefully evaluate petitioner's state of mind, rather than to presume it, noting that "Anglo-Saxon Jurisprudence has long recognized gross negligence as a distinct standard . . . and New Jersey Courts have recognized the distinction between gross negligence and willful, knowing conduct." *Id.*

Notwithstanding the foregoing argument, the state Court in *Skevin* simply presumed that Mr. Skevin acted with corrupt intent and presumed he was unfit to practice law.

The federal constitutional implications of the New Jersey Court's breach of confidentiality also was carefully raised below. "[T]he attorney facing disbarment is entitled as a matter of right to procedural due process," petitioner's counsel wrote in the brief below citing *In re Ruffalo*, 390 U.S. 544 (1968). "This requires that principles of basic fairness be observed. These rights are guaranteed by the Fifth and Fourteenth Amendments." Petitioner's brief went on to condemn the New Jersey disciplinary system's breach of confidentiality as a violation of Mr. Skevin's "right to privacy" and, citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966), contended that adverse publicity "made it impossible for Mr. Skevin to receive a fair determination." [Petitioner's Brief below at 52 and 60].

While admitting that it was "deeply troubled" [App. 15] by the breaches of confidentiality, the Court below declined to dismiss the charges against Mr. Skevin.

Finally, it should be noted that on December 14, 1986, petitioner moved in the New Jersey Supreme Court for a stay of its disbarment Order and in support of that motion presented that Court with a near-final draft of petitioner's motion for a stay in this Court. The draft included citation and full discussion of *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957). Although the New Jersey Court had the power at that point *sua sponte* to rule on those constitutional issues, cf., e.g. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 430-31 (1982), it merely issued a three-day stay.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner

*Counsel of Record

APPENDIX A

SUPREME COURT OF NEW JERSEY

D-2 September Term 1986

IN THE MATTER OF
JOHN M. SKEVIN,
An Attorney at Law.

Argued September 8, 1986—Decided November 14, 1986

On an order to show cause why respondent should not be disbarred or otherwise disciplined.

Thomas J. McCormick, Assistant Ethics Counsel, argued the cause for Office of Attorney Ethics.

Leon J. Sokol argued the cause for respondent (*Greenstone & Sokol,* attorneys; *Michael C. Urciuoli* and *Frank A. Campana,* on the brief).

PER CURIAM.

This case arises from a report and recommendation of the Disciplinary Review Board (DRB) that respondent be disbarred. The Board's report follows the finding of a Special Master appointed to make a factual record with respect to certain charges of ethical misconduct that had been made against respondent. We find, as did both bodies, that the record demonstrates by the required standard of clear and convincing proof, that violation of the tenets of *In re Wilson,* 81 *N.J.* 451 (1979), has been shown and that under those principles the conduct must result in disbarment.

I.

Because of the paramount importance of the *Wilson* issue, we shall but briefly detail the other ethical matters

that were heard, since the findings on none would have merited disbarment. We shall refer to the matters by the count numbers in the Second Amended Complaint that formed the basis of the hearing below.

Count One, the *Dodd* matter, involved a dispute regarding the handling of a real estate matter by Mr. Skevin. He represented the Dodds as purchasers in a substantial commercial transaction. Since certain title problems remained at the closing, he held a $35,000 escrow. He released $20,000 to the sellers approximately two weeks after the closing. He was deficient in recording the deed and mortgage, apparently due to a breakdown in his office management. A purchase money mortgage was not recorded for almost two months after the closing. He did not properly resolve the various tax and title problems that caused the escrow to be set up.

As a result of these various delays, when his client sought to "flip" the property through quick resale, title problems arose that occasioned delay and caused the Dodds' attorney on the resale to set up a $10,000 escrow to clear the matters. The client complained that Mr. Skevin turned over the $20,000 from the escrow to the seller without satisfactory clearance from the title company. But the Special Master found, and we agree, that the disbursements to the seller, as well as additional disbursements to the Internal Revenue Service, the municipal tax office, and the State of New Jersey Division of Taxation, were appropriate payments to be made from the escrow account. After these disbursements, however, Mr. Skevin was still responsible for a balance of at least $7,654 from the $35,000 escrow account. Examination of his accounts disclosed that during the requisite period between the closing and the satisfac-

tion of the escrow items, there was a shortage in Mr. Skevin's trust account. As late as June 8, 1982, the trust account balance was $4,367, an amount less than the $7,654 necessary to cover the balance of the escrow. It is this latter point that we shall address in the consideration of the *Wilson* violations.

But as to the other claims, we agree with the finding of the Master that the failure to record the deed and purchase money mortgage promptly was a matter of professional neglect that would not have warranted a disciplinary action. The payments made by Mr. Skevin from the account were justified. The requirement of a $10,000 escrow account was something for which Mr. Skevin was not directly responsible and the proofs are lacking that any improper conduct of Mr. Skevin caused his client to participate in the $10,000 escrow on the resale.

Count Two of the complaint dealt with the *Schrader* matter, the complaint that appears to have generated the most controversy. The case involved a personal injury matter that Mr. Skevin handled on behalf of his client, John Schrader. Schrader had suffered multiple injuries and one of his legs had to be amputated below the knee. Mr. Skevin had done considerable legal work for the parents and was retained to represent John. Suit was brought and on November 1, 1982, the case was settled for a total of $250,500 with several defendants contributing to the settlement. Payments came in at various intervals, beginning in November of 1982 and ending with final payment on January 25, 1983. The total fee allowable to Mr. Skevin was $57,094.

The ethics complaint grew out of a dispute between the Schrader family and Mr. Skevin as to what his fair

charges should have been. The Schraders had asked for an accounting before the March 1, 1983 filing of the ethics complaint. Eventually, the Schraders obtained their own attorney, and as a result of those communications a formal accounting was rendered on April 20, 1983. The key ethical allegations here are that Mr. Skevin delayed the accounting, wrongfully withheld funds due his clients, improperly made advances both to himself and his client prior to the receipt of the settlement funds, sought unlawfully to extract payments from the clients out of the settlement proceeds, and illegally endorsed one of the settlement checks in the matter.

On the substantive contentions, the Master found that Mr. Skevin had at least an arguable claim to a portion of the proceeds that were due to him from other matters of the Schraders. Some amounts of this claim were eventually determined through arbitration between the Schrader parents and Mr. Skevin, others through release. The Master further found that the evidence was inconclusive with respect to whether there was oral authorization by John Schrader to sign the settlement check. The Master stated that the delay caused in settling this matter was not caused by any fraudulent claim by Mr. Skevin and concluded, "[h]e thought, rightly or wrongly, that he had a claim to be so compensated. Events subsequent to the accounting of April 20, 1983 should be treated as a business dispute, rather than a question of Disciplinary Rule violation."

Of course, the Master found that the advances to Mr. Schrader prior to the receipt of the settlement funds were inappropriate and unauthorized. But the Master said:

> The conclusion is that the loans [made to the client and the withdrawal of fees and disbursements before receipt of the settlements funds] represent a misuse of funds held in trust for clients other than Schrader, or use of personal funds that should not have been commingled with clients' trust monies or a combination of the two * * * * [but] that the unethical conduct represented by the loans made to the client is conduct for which a private reprimand would constitute adequate discipline.

Count Three, the *Onello* matter, involved a complaint of unethical conduct by Joseph Onello, at former business partner and client of Mr. Skevin. He complained of Mr. Skevin's handling of a real estate transaction in which Mr. Skevin acted as an attorney for the joint venture with Onello. The complaint was primarily based upon Mr. Skevin's failure to get the sellers' taxes assessed and paid promptly and on his failure to record the deed and mortgage promptly. This closing also involved a $10,000 escrow account to be held in Mr. Skevin's trust account pending clearance by the sellers of certain tax liens clouding the title. Shortly after the closing, Mr. Onello bought out Mr. Skevin's interest in the property. On June 1, 1983, Mr. Onello attempted to withdraw his complaint; the District Ethics Committee nevertheless chose to pursue the matter.

There were difficulties with respect to the transaction. It was not until October 10, 1983, some 19 months after the closing, that Mr. Skevin was permitted by the seller's attorney to release the funds. On this matter, the Master recommended dismissal of the substantive charges subject to his observation that although it was clear that Mr. Skevin was to maintain a $10,000 escrow account, the entire balance in the trust account fell below $10,000 dur-

ing a number of intervals in the fall of 1983 between the closing date and the paying out of the $10,000. Money that should have been kept in the trust account to serve as the $10,000 escrow fund was used for purposes not related to the joint venture.

Count Seven, the *Santana* matter, involved an inappropriate advancement of settlement proceeds to an indigent client. The making of loans while the case was pending was a violation of DR 5-103(B) (now RDC 1.8(e)), but the Master believed the matter could have called for a private reprimand.

Count Eight of the complaint referred to a number of matters dealing with failure to obtain fee agreements, failure to advise of alternate fees, or miscalculation of contingent fees. All of these were dismissed by the Master. Count Nine of the complaint dealt primarily with overdrafts in Mr. Skevin's business and personal accounts, matters that were characterized by the presenter as "de minimis" and would not have warranted disbarment. There was, however, an admitted allegation with respect to a trust fund check being dishonored for insufficient funds but which respondent reissued with adequate funds available.

II.

Our central focus must be on Counts Four, Five and Six of the superseding complaint that the Office of Attorney Ethics served upon the respondent. These counts charge that respondent *knowingly* misused client trust funds, did not maintain separate accounts for trust and business records, did not maintain contemporaneous trust

account records as required by Rule 1:21-6 for 1982 and 1983, and extensively commingled clients' funds with his own. For the purpose of simplicity, Counts Four, Five and Six will not be treated separately given the similarity of the allegations and ethical misconduct. The background to these charges is that in investigating the complaints of *Dodd, Schrader* and *Onello,* the Office of Attorney Ethics caused an audit to be made of the respondent's financial affairs. During the course of that audit it was learned that respondent had for several years commingled personal and client funds in his attorney trust account.

This practice clearly violates Rule 1:21-6, which provides in pertinent part:

> Every attorney who practices in this state shall maintain in a financial institution in New Jersey * * * :
>
> (1) a trustee account or accounts, separate from any business and personal and from any fiduciary accounts * * *, into which trustee account or accounts funds entrusted to the attorney's care shall be deposited; and
>
> (2) a business account into which all funds received from professional services shall be deposited.
>
> Other than fiduciary accounts * * *, all trustee accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account."

The conduct also violated Disciplinary Rule 9-102(A), in force during the relevant years, which stated that escrow funds of clients paid to the lawyer had to be maintained in identifiable accounts separate from the attorney's business account. Present Rule of Professional Conduct 1.15(a) essentially restates this mandate. Further investigation

disclosed that respondent's accounts were apparently "out of trust" over an extended period of time in 1982 and part of 1983.

Because of concern for clients' funds, the Office of Attorney Ethics (OAE) petitioned for immediate temporary suspension of respondent pursuant to Rule 1:20-4(g) in March 1984. In support of that application the OAE submitted the investigation and audit of its accountant, Louis Brief, which disclosed that in addition to the lack of contemporary trust account records, the reconstructed records showed substantial deficits in respondent's trust balances, ranging from $12,469 in June 1982 to $133,476 in December 1982. Specifically, the evidence contained in Exhibit C-105 showed that respondent was out of trust as follows:

June 1, 1982	$ 12,469.99
July 1, 1982	70,267.31
August 1, 1982	72,252.18
September 1, 1982	65,618.20
October 1, 1982	92,552.27
November 1, 1982	114,704.29
December 1, 1982	133,476.40

The respondent denied that he had knowingly misused clients' funds, noting that he had deposited close to $1 million of personal funds in the account during the relevant periods of time, which would have, he thought, been sufficient to cover any personal withdrawals from the account. His accountant factually disputed the contentions of the OAE's accountant that there was a deficit in his account in excess of $133,000 as of December 1982. At this point, respondent's accountant said that the deficit was far less

and was the result of mere inadvertence in handling the account. With the central matter of knowing misappropriation being in dispute and believing that the public interest could be protected by permitting the proofs to be resolved before terminating respondent's practice, the Court denied the petition so long as the accounts were supervised under proctorship to be regularly reviewed in the disciplinary process.

Resolution of the disputed issues required a fuller examination of respondent's books of account and extended study of the many transactions that occasioned the charge of misuse of trust funds. A broadly experienced retired trial judge was selected as Master to conduct that factual hearing. At the hearing, respondent stipulated to many of the basic underlying facts, particularly the basic facts concerning the *Dodd, Schrader* and *Onello* matters. Some concern has been raised that certain claimants in those matters were precluded from offering personal testimony with respect to the matters in issue after apparently receiving subpoenas to testify. We believe that oral proof would not have aided the Master in resolution of the disputed issues and we are satisfied that the proofs would not have been dispositive as to the ultimate proceedings. Further proof as to the allegedly unauthorized signature to the settlement check would not have altered the result significantly since the question turns not on the receipt of the funds but the ultimate disposition of the funds, a matter disclosed by the record. We regret the misunderstanding that occasioned the clients to believe that their evidence was wrongly withheld; perhaps more care should be taken to explain the meaning of stipulations to the aggrieved parties.

For the reasons that we shall later state in more detail, respondent has conceded that there were undoubtedly oc-

casions when clients' funds had been used because the outstanding balances in the trust account were insufficient to cover the amounts that were admittedly due to clients. The exhibits and testimony before the Master clearly and convincingly demonstrate the basic facts with respect to the commingling of clients' funds with personal funds, the lack of required recordkeeping on respondent's part, and the existence of actual deficits in the trust account. The respondent's expert eventually recognized that the shortfall in December 1982 had to be at least $105,000. Specifically, as noted, the *Dodd* deficit was $3,287 on June 8, 1982.

The key issue that the Master and the DRB had to resolve was whether the shortages were the result of knowing misuse or were the product of inadvertent error or neglect in the handling of funds. In our decisions, we have not extended the *Wilson* sanction to such instances of limited, inadvertent and unintentional misuse of clients' funds. *In re Hennessy*, 93 *N.J.* 358, 361 (1983) ("no intentional use of funds belonging to others" warrants public reprimand); *In re Noonan*, 102 *N.J.* 157 (1986) (gross negligence insufficient to warrant disbarment where attorneys did not know client's money misappropriated).

The Master concluded that this case did not fall into the pattern of those cases. The marshalled evidence that distinguishes this case from those was that respondent clearly knew that he was withdrawing clients' funds from commingled accounts on each occasion when he drew his on fees or disbursements in advance of receiving settlement checks. Exhibit C-101 before the Master disclosed specific instances of plaintiff's personal injury practice in which respondent reimbursed himself for fees and costs by with-

drawing funds from his trust account before settlement proceeds were received. The time periods were sometimes substantial, as long as months between the advance to himself and the receipt of the settlement checks. The amounts were also substantial, ranging from hundreds of dollars to thousands. These two facts lead to the unavoidable inference that respondents knew that he was endangering other clients' funds that were in the commingled account. The same exhibit, C-101, also disclosed that respondent rarely distributed funds to clients before settlements proceeds were received. But when it happened, he had to know that an unauthorized withdrawal from a commingled account was occurring.

Both of these practices were highlighted in the *Schrader* case. Respondent, although knowing that he had not yet received the settlement proceeds, undertook to draw on the uncollected and, indeed, unreceived funds admittedly for the client but also for his own account. In doing so, he knew that he was invading the trust account that by his own admission contained both clients' funds and personal funds. Had respondent maintained a separate, personal account for such purposes, his position might be defensible. But respondent candidly admitted he just assumed there was enough money in the trust account to handle the trust disbursements. It is also undisputed that he did not maintain an accounting or running balance of his own funds in the trust account. Hence, it follows that each such advance posed an at least realistic likelihood of invading the accounts of another client since respondent had no way of knowing what the balances were. *Cf. In re Fleischer, supra,* 102 *N.J.* at 447 (while poor accounting does not establish a knowing misappropriation, poor ac-

counting is not a *Wilson* defense if evidence indicates knowing misappropriation).

While such evidence might not sustain a finding of criminal intent to deprive others of their funds, the evidence clearly and convincingly demonstrates that defendant knew the invasion was a likely result of his conduct, a state of mind consistent with the definition of knowledge in our statute law. *N.J.S.A.* 2C:2-2b(2). The concept arises in a situation where the party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist. "Such cases should be viewed as acting knowingly and not merely as recklessly. The proposition that willful blindness satisfies for a requirement of knowledge is established in our cases." 2 Final Report of the New Jersey Criminal Law Revision Commission, *The New Jersey Penal Code*, 44 (1971) (commentary) (citing *State v. Jusiak*, 16 *N.J. Super.* 177, 181 (App. Div. 1951); *State v. Loomis*, 89 *N.J.L.* 8 (Sup. Ct. 1916); *accord Model Penal Code and Commentaries* (Official Draft and Revised Comments) § 2.02(7), 248 (comment) (1985).

Further confirmation for the finding, as set forth by the Master, is in his analysis of the 1983 deficits related to the *Dodd, Schrader* and *Onello* matters. It is undisputed that the respondent had to make a $25,000 loan to the trust account on March 16, 1983, for the purpose of paying Schrader an additional $25,000 on his award. Respondent was thus personally aware on that date that his handling of the trust account had produced the deficit result. Notwithstanding that knowledge, respondent continued to withdraw funds and the account remained in a deficit state in 1983 in that the $10,000 due to Onello did not remain intact in

the account. *Exhibit C-93,* statement dated 3-31-83. As noted, the Onello closing took place on March 5, 1982, but the final disposition of trust proceeds did not take place until October 10, 1983. Respondent admitted that he was the only person with any real authority over or supervision of the account. Although some administrative duties were entrusted to his secretary, she was not asked to balance the account, nor did she see the trust account bank statements. Hence, we must concur with the Master that

> [t]he finding is that he knew in 1982 and 1983 of the deficit condition of his trust account and knew that the condition had been produced, and was being continued, by writing checks against trust accounts that should have remained untouched until used for the purposes for which they had been entrusted to him.

But again, respondent's prior handling of the trust account, even without this additional evidence, would have been sufficient to prove by clear and convincing evidence a knowing misappropriation.

III.

Although we have concluded that the *Wilson* sanction must be invoked here, there is an aspect to this case that deeply troubles us. Respondent moved before the Master to dismiss the proceedings in whole or in part because of the apparently deliberate breach of the confidentiality of the disciplinary proceedings. The Master ruled that if only individual parties were involved, dismissal might be appropriate; but the fact that there was a public interest involved tipped the balance so as to preclude dismissal. We agree.

We have taken extraordinary steps to protect the public interest in ethics disciplinary proceedings by afford-

ing to litigants who respect its confidentiality an immunity from suit for malicious prosecution. *R.* 1:20-11(b); *In re Hearing on Immunity For Ethics Complainants*, 96 *N.J.* 669 (1984). In exchange, we insist only that the parties who invoke the disciplinary process respect its concept of confidentiality until a finding is made. We do this because we believe that in balancing the interest in vindicating clients' rights with an attorney's professional reputation for integrity, we must recognize that even an unsubstantiated charge can, if misunderstood, do irreparable damage to an attorney without any corresponding public benefit. The record in this case demonstrates the result of such unauthorized disclosures. The evidence testified to by Mr. Skevin is that he suffered a serious decline in his professional practice while these proceedings were pending. With the exception of the *Wilson* violations, almost all of the matters complained of were resolved in a manner that almost certainly would not have resulted in disbarment or serious discipline. The circumstances thus demonstrate how an attorney may be tried and convicted, before the facts are known, through manipulation of events outside the hearing room. In almost all of the matters the clients complained of, respondent's deficiencies were either disproven or were not of ethical gravity. We cannot expect those not directly concerned with the administration of justice to share our concern for a fundamental fairness that would insist on respecting the peculiarly sensitive nature of these proceedings; still, we should take steps to guarantee that fairness against abuse.

Though it would be of no benefit to respondent now, others may be protected from such unfairness by our insistence upon respect for the confidentiality rules and a

clear understanding by *any participant* in the process that he will not only forfeit any immunity from just prosecution for malicious abuse of the process, but that should he violate the rules of the disciplinary process he should expect that the sanctions of the law would be invoked.

Finally, we must advert to the extraordinary suffering that this individual respondent has incurred. We note the ravaging diseases that afflicted his mother, his son, and his sister, the consequences of which contributed to the decline of his marriage, and the breakup of his family, as well as his own personal health problems. They cannot be ignored. There is a limit to the ability of any human to cope with such adversity. This is a tragic end to the only partially fulfilled promise of a public servant and counsellor. In the matter most grievously complained of, the *Schrader* matter, it appears that the respondent obtained a significant award for this young accident victim in gaining the $250,500 settlement. It has been urged that his advancement of the client's funds was motivated by a desire to help his client overcome the adversity that arose from the client's disagreement with his own family over a marriage that resulted in the client being out of his house with no place to live. The same motives apparently prompted the handling of the *Santana* matter. This young man was apparently alone and unaided in the community and relied upon respondent for more than legal advice. There is no venality in that conduct.

We recognize the human suffering occasioned by the almost inflexible invocation of the *Wilson* standard. But we have been unable to rationalize the qualitative differences that would excuse the violation in the case of one

suffering disease or defeat, or one suffering from drugs or other dependency from one suffering the anguish of collapsing home life or marriage due to economic or other strains. Consequently, we have chosen to resolve the choice of professional discipline by maintaining our primary focus on the public interest. In doing so, we have been compelled to apply the *Wilson* sanction to attorneys of unblemished record whose misuse of funds had not injured clients, *In re Lennan*, 102 *N.J.* 518 (1986), and to attorneys who had devoted considerable amounts of their practices and lives to helping needy litigants. *In re Brown*, 102 *N.J.* 512 (1986). We do so here.

The judgment is that respondent be disbarred.

Justices Clifford, Handler, Pollock, O'Hern, Garibaldi and Stein join in this opinion. Chief Justice Wilentz did not participate.

SUPREME COURT OF NEW JERSEY

No. D-2 September Term 1986

Disposition Disbar

IN THE MATTER OF
JOHN M. SKEVIN

An Attorney at Law.

Decided November 14, 1986
Order returnable
Opinion by PER CURIAM

APPENDIX B

SUPREME COURT OF NEW JERSEY
D-2 September Term 1986

IN THE MATTER OF
JOHN M. SKEVIN,
An Attorney at Law.

ORDER

It is ORDERED that JOHN M. SKEVIN of HACKENSACK, who was admitted to the bar of this State in 1956, be disbarred and that his name be stricken from the roll of attorneys of this State, effective immediately; and it is further

ORDERED that JOHN M. SKEVIN be and hereby is permanently restrained and enjoined from practicing law; and it is further

ORDERED that respondent comply with Administrative Guideline No. 23 of the Office of Attorney Ethics dealing with disbarred attorneys; and it is further

ORDERED that respondent reimburse the Ethics Financial Committee for appropriate administrative costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 14th day of November, 1986.

/s/ Stephen Linuseurd
CLERK

APPENDIX C

1:21-5. *Counsellors; Masters Abolished*

The titles of Counsellor-at-law of this State, Master of the Superior Court, and Special Master, Commissioner or Examiner of the Superior Court, are abolished.

Note: Source—R.R. 1:21-1, 1:21-2, 1:21-3.

1:21-6. *Recordkeeping; Sharing of Fees; Examination of Records*

(a) *Required Bank Accounts.* Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:

(1) a trustee account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which trustee account or accounts funds entrusted to the attorney's care shall be deposited; and

(2) a business account into which all funds received for professional services shall be deposited.

Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all trustee accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account". Nothing herein

shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as either an "Attorney Business Account", an "Attorney Professional Account" or an "Attorney Office Account".

The names of institutions in which such accounts are maintained and identification numbers of each account shall be recorded on the annual registration form filed with the annual payment, pursuant to R. 1:20-1(b) and R. 1:28-2, to the Ethics Financial Committee and the Clients' Security Fund of the Bar of New Jersey. Such information shall be available for use in accordance with paragraph (g) of this rule.

An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court which shall annually publish a list of such approved institutions. An financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether or not the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon 30 days notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by said financial institutions shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the de-

positor; (2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within 5 banking days of the date of presentation for payment against insufficient funds. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust account or attorney business account records upon receipt of a subpoena therefor. Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable cost of producing the reports and records required by this rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(b) *Required Bookkeeping Records.* Attorneys, partnerships of attorneys and professional corporations who practice in this State shall maintain in a current status and retain for at period of 7 years after the event which they record:

(1) appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns of affects

their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by authorized intrastate or interstate bank transfer or by check payable to a named payee and not to cash. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account; and

(2) an appropriate ledger book, having at least one single page for each separate trust client, for all trustee accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed; and

(3) copies of all retainer and compensation agreements with clients; and

(4) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

(5) copies of all bills rendered to clients; and

(6) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and

(7) all checkbooks and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips; and

(8) copies of all records, showing that at least quarterly a reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and

(9) copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(c) *Type and Availability of Bookkeeping Records.* The financial books and other records required by paragraphs (a) and (b) of this rule shall be maintained in accordance with generally accepted accounting practice. Bookkeeping records may be maintained by computer provided they otherwise comply with this rule and provided further that printed copies can be made on demand in accordance with this section or section (g). They shall be located at the principal New Jersey office of each attorney, partnership or professional corporation and shall be available for inspection, checks for compliance with this Rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics. When made available pursuant to this rule, all such books and records shall remain confidential except for the purposes thereof or by direction of the Supreme Court, and their

contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

(d) *Dissolutions.* Upon the dissolution of any partnership of attorneys or of any professional corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph (b) of this rule.

(e) *Members, Associates and Employees of Out of State Firms.* No attorney who practices in this State who is a member of a firm, or an associate or employee of a firm or attorney, practicing outside this State:

(1) shall share with such firm or attorney any fee for legal services rendered in this State if payment to such firm or attorney is prohibited by R.P.C. 1.5(e) of the Rules of Professional Conduct; or

(2) shall fail to maintain and preserve for 7 years separate records of the fees received and expenses incurred in the attorney's practice of law in this State.

(f) *Attorneys Associated With Out of State Attorneys.* An attorney who practices in this State shall maintain and preserve for 7 years a record of all fees received and expenses incurred in connection with any matter in which the attorney was associated with an attorney of another state.

(g) *Availability of Records.* Any of the records required to be kept by this rule shall be produced in response to a subpoena *duces tecum* issued in connection with an ethics investigation or hearing pursuant to R.1:20-1 to 1:20-

11, or shall be produced at the direction of the Disciplinary Review Board or the Supreme Court. They shall be available upon request for review and audit by the Office of Attorney Ethics. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

(h) *Disciplinary Action.* An attorney who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who fails to produce such records as required shall be deemed to be in violation of R.C.P. 1:15(d).

(i) *Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners.* When, for a period in excess of 2 years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may, after the passage of 1 year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for

deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

Note: Source—R.R. 1:12-8A(a)(b)(c). Caption amended and paragraph (d) adopted July 1, 1970 effective immediately; paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended April 2, 1973 to be effective immediately; paragraph (c) amended July 17, 1975 to be effective September 8, 1975; caption and paragraph (a) amended July 29, 1977 to be effective September 6, 1977. Paragraphs (a) and (b) amended, new paragraph (c) adopted and former paragraphs (c), (d), (e), (f) and (g) redesignated and amended February 23, 1978 to be effective April 1, 1978; paragraphs (b), (c) and (h) amended November 22, 1978 to be effective January 1, 1979; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b), (c), (g) and (h) amended January 31, 1984 to be effective February 15, 1984 except that the amendments to paragraph (a)(2) regarding designations to be placed in trust and business accounts shall not be effective until July 1, 1984; effective date of amendment to paragraph (a)(2) deferred on June 15, 1984 from July 1, 1984 to September 1, 1984; paragraphs (a)(1) and (2), (c)(1) and (h) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a), (c) and (f) amended November 1, 1984 to be effective March 1, 1985; paragraphs (b) and (c) amended and paragraph (i) adopted November 5, 1986 to be effective January 1, 1987.

1:21-7. *Contingent Fees*

(a) As used in this rule the term "contingent fee arrangement" means an agreement for legal services of an attorney or attorneys, including any associated or forwarding counsel, under which compensation, contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed or is to be determined under a formula.

(b) An attorney shall not enter into a contingent fee arrangement without first having advised the client of the right and afforded the client an opportunity to retain him under an arrangement whereby he would be compensated on the basis of the reasonable value of his services.

(c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

(1) 33⅓% on the first $250,000 recovered;

(2) 25% on the next $250,000 recovered;

(3) 20% on the next $500,000 recovered; and

(4) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof; and

APPENDIX D

Supreme Court of the United States

No. A-463

JOHN M. SKEVIN,

Applicant,

v.

SUPREME COURT OF NEW JERSEY

O R D E R

UPON FURTHER CONSIDERATION of the application of counsel for the applicant, and the response filed thereto,

IT IS ORDERED that the order of the Supreme Court of New Jersey, case No. D-2086, entered December 16, 1986, be and the same is hereby, continued pending the timely filing of a petition for writ of certiorari in the above-entitled case. In the event the petition for a writ of certiorari is so timely filed, this order is to remain in effect pending this Court's action on the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. If the petition for a writ of certiorari is granted, this order is to remain in effect pending the issuance of the mandate of this Court.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 23rd day of December, 1986.

A true copy JOSEPH F. SPANIOL, JR.
Test:

Clerk of the Supreme Court of the
United States

By: Frances J. Carson
Chief Deputy

Supreme Court of the United States

No. A-463

JOHN M. SKEVIN,

Applicant,

v.

SUPREME COURT OF NEW JERSEY

O R D E R

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the order of the Supreme Court of New Jersey, case No. D-2-86, entered December 16, 1986 be and the same is hereby continued, pending receipt of a response due on or before December 22, 1986, at noon, and further order of the undersigned or of the Court.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of December, 1986

A true copy JOSEPH F. SPANIOL, JR.

Test:
Clerk of the Supreme Court of the
United States

By: Francis J. Carson
Chief Deputy

APPENDIX E

STATE OF NEW JERSEY

ss

COUNTY OF BERGEN

I, RAYMOND F. FLOOD, ESQ., upon my oath depose and say:

1. I am an attorney licensed in the State of New Jersey, with offices at 39 Hudson Street, Hackensack, New Jersey.

2. On or about July 20, 1984, I was advised that I had been appointed by the New Jersey Supreme Court to serve as a proctor for John M. Skevin, Esq. As part of my duties, I became a co-signator on his regular business and trust account, and supervised the general financial affairs of his practice.

3. To assist me in this matter, I engaged William Morrison, a certified public accountant who has reviewed Mr. Skevin's accounts on a monthly basis and prepared a monthly report which we have submitted to the Office of Attorney Ethics.

4. I've been informed by Mr. Skevin that he has given up his practice and has become of counsel to the firm of John Paolella located at 479 Main Street Hackensack, New Jersey. As part of this arrangement, Mr. Skevin will no longer be a signator on any business or trust accounts. All of the fees he earns for legal services rendered will be paid to Mr. Paolella's firm, and then Mr. Paolella will in turn pay Mr. Skevin in accordance with a contractural arrangement.

5. In view of the fact that Mr. Skevin no longer has financial affairs to supervise, I have requested that the Supreme Court relieve me of my proctor responsibilities.

6. In the course of the past year that I have served as Mr. Skevin's proctor, I have observed him professionally and personally. Mr. Skevin appears to be a competent professional, providing good quality legal services to his clients. Mr. Skevin's legal files appear to be well organized and he obtains good results for his clients which primarily involve negligence actions. I found his bookkeeping and other record keeping to be disorganized, however.

7. I have also observed a steady deterioration in his practice over the past year. It is my impression that because of the adverse publicity which has attended his ethics proceedings, most of his clients have left him. Those who have stayed have primarily been persons with whom he has a personal relationship.

8. This deterioration in his practice has caused him severe financial difficulty, and placed him under substantial pressure. I note that as the practice has deteriorated, Mr. Skevin has become increasingly anxious in his financial affairs. He has sought to borrow money from friends, some of whom are also clients, and in one instance I had to question the propriety of his seeking a loan from a friend for whom he had rendered legal services and obtained a substantial judgment just a few weeks prior. It should be noted that the amount of the loan was $60,000.00, which represented a substantial portion of the net proceeds of the settlement. ($84,366.68 to the client). I called this to

Mr. Skevin's attention and he returned the money to those persons and arranged to borrow it from another source.

/s/ Raymond F. Flood, Esq.

Sworn and subscribed to before me this —— day of July, 1985.

APPENDIX F

THE STAR-LEDGER, Friday, June 8, 1984

Suspension of attorney asked pending ethics hearings

Ex-legislator accused of misusing client trust funds

By ROBERT G. SEIDENSTEIN

An attorney disciplinary official yesterday urged the New Jersey Supreme Court to temporarily suspend former state Sen. John Skevin of Bergen County from the practice of law.

Thomas McCormick, chief of hearings for the Office of Attorney Ethics, told the court that Skevin had used client funds "as his own private bank" and that an audit of his records showed a $147,000 shortfall in funds supposedly being held in trust for his clients.

McCormick also said that Skevin had improperly comingled his own money with the trust funds.

Skevin's attorney, Leon Sokol, said, on the other hand, that the matter merely involved "sloppy bookkeeping." He added that there was "not an intentional" misuse of client funds.

Sokol put the shortfall in trust funds at $32,000 as of the end of 1982 and noted that Skevin had taken corrective steps regarding the funds.

Yesterday's hearing represented the first public word that the former legislator was facing attorney ethics charges. The court reserved decision on whether to temporarily suspend Skevin while the proceedings against him continue.

Trust funds are accounts lawyers hold for the benefit of clients. Strict disciplinary rules govern such accounts.

During yesterday's hearing in Trenton, Justice Robert Clifford noted that there were "admittedly appalling lapses of bookkeeping" on Skevin's part.

Skevin, a Democrat, lost his state Senate seat in the 1981 election. He was elected to the Assembly in 1965 and first elected as a senator in 1973. He practices law in Hackensack.

• • •

Sokol, in arguing against temporary suspension of his client, admitted that Skevin had comingled more than $1 million in his own investment money—garnered over several years—with client trust funds. Even though he could not "hold him up as a model of bookkeeping," Sokol said that Skevin always had "well-represented" his clients.

Sokol added that as far as the trust funds were concerned, the money was "all restored" and that all claims made by clients "have been satisfied."

Justice Clifford, however, noted allegations regarding Skevin's alleged practice of "lending" money from the comingled account "to himself." And Justices Sidney Schreiber and Stewart Pollock pressed Sokol as to why Skevin had comingled accounts and used trust funds for his own purposes.

Sokol responded that Skevin had been acting that way for years. He said Skevin saw the comingling of his own funds with client funds as a "safeguard" against bank overdrafts.

Skevin, who attended the court session, declined comment on the disciplinary action being taken against him.

McCormick predicted that disciplinary board hearings into the underlying case against Skevin would be completed within two months. Several justices, however, were skeptical about the matter being dealt with in such a short period.

• • •

The New Jersey Supreme Court has ultimate authority to discipline lawyers in the state. It generally exercises its authority by reviewing recommendations regarding sanctions against particular attorneys.

At the close of yesterday's session, Sokol agreed to find someone to serve as co-trustee of accounts held by Skevin.

John Skevin
$147,000 shortfall

THE NEW YORK TIMES, SUNDAY, AUGUST 26, 1984

Ex-State Senator Faces Ethics Inquiry

By ALBERT J. PARISI

HACKENSACK

JOHN M. SKEVIN, once a legislator and still a redoubtable figure in state and Bergen County politics, is battling to retain his license to practice law amid charges that he comingled clients' funds with his own and complaints that are before the State Office of Attorney Ethics in Trenton.

Late in June, the State Supreme Court ruled 4 to 2 not to suspend the 56-year-old lawyer's license pending the outcome of the ethics investigation. But it stipulated that he could practice only under direct supervision of another lawyer, Raymond F. Flood of Hackensack, a former Bergen County assistant prosecutor, who must report monthly directly to the ethics office.

Mr. Skevin was a State Senator from 1974 to 1982, serving on the Senate Judiciary Committee, which oversaw and nominated judges and county prosecutors, and an assemblyman for two.

According to Thomas McCormick, chief hearing officer of the Office of Attorney Ethics, and David Johnson, the office director, Mr. Skevin is charged with misappropriating $150,000 in client funds. The figures were established by a state audit.

By law, lawyers may not intermingle their own and clients' funds. Mr. McCormick said during a Supreme Court hearing in June that Mr. Skevin had violated that regulation for years and that over a three-year period, he had combined some $1 million of his own money with clients' funds and used the comingled accounts as "his own private bank" for real-estate ventures.

Leon Sokal, Mr. Skevin's attorney, called the reported mishandling of funds no more than "sloppy bookkeeping" and said the shortfalls were closer to $40,000.

The complaints before the ethics panel specifically charge that Mr. Skevin continues to owe clients money as a result of overcharging of fees set by the State Supreme Court and of fees for services that were either not rendered or improperly conducted.

About 10 complaints are under review. They are said to involve improper comingling of funds, forgery, misappropriation of client trust funds, professional misconduct and lack of diligence.

Mr. Skevin chose not to comment and referred all questions to his attorney, who. would neither confirm nor deny the charges, citing the client-attorney privilege and saying that the ethics investigation was still going on.

In 1979, the State Supreme Court ruled that lawyers found to have misappropriated client funds would be disbarred in almost all instances.

In 1983, Mr. Johnson said, the Office of Attorney Ethics received nearly 1,400 ethics-related complaints. In 1982, he said, there were 1,325 complaints. Nearly half the cases in which lawyers were disciplined by the State Supreme Court involved client funds, he said.

Last year, he said, 31 lawyers were disciplined by the court, with penalties ranging from public reprimands to disbarment. In 1982, 35 lawyers were disciplined and in 1981, 23.

Some legal experts say privately that once the ethics investigation is completed and made public (it is expected to be completed in early October) a number of other ethics-related complaints may arise from clients of the former Senator who are awaiting the outcoming of current charges.

One of the complaints before the Office of Attorney Ethics involves John D. Schrader of Fort Lee.

In June 1979, Mr. Schrader, then 20 years old, was helping a tow-truck operator change a flat tire on his car in Little Ferry when another car struck him. The driver, attempting to flee, backed over him.

Today, after 25 operations and the amputation of his left leg, Mr. Schrader and his father, James, of Teaneck, assert that the young man was taken advantage of by Mr. Skevin, whom they had retained.

According to documents provided by the Schraders, Mr. Skevin, who had previously represented the family in legal matters, had informed them that a $3 million settlement could easily be obtained if the son took the matter to court.

Mr. Schrader took his attorney's advice. In October 1982, after months of legal preparation, the matter was settled out of court for $250,500.

Of that amount, the elder Mr. Schrader said, Mr. Skevin took some $57,000 as a fee and $30,500 in fees on related legal matters and for undocumented disbursement costs, leaving his son with $162,000.

Complicating the matter, the Schraders say, is an insurance check, part of the settlement, made out to both Mr. Schrader and Mr. Skevin and dated Jan. 7, 1983. The check was signed and deposited to a client trust account maintained by Mr. Skevin.

The younger Mr. Schrader said that he had not endorsed the check and had not even found out about it until two months after the funds were deposited.

"I was trying to piece my life back together again at the time," he said. "The last thing on my mind was worrying about the settlement. That's what I hired an attorney for."

Mr. Skevin has produced an affidavit from a secretary, Jean Fostvedt — who has since left his employ — asserting that Mr. Schrader signed all checks made out to him. Mr. Schrader denies this, adding that he had never authorized the use of his signature to anyone on Mr. Skevin's law staff.

Soon after Mr. Schrader confronted the attorney with his knowledge of the check, Mr. Skevin issued two personal checks to the young man in the amount of $40,000.

Mr. Schrader hired a handwriting analyst, the Rev. Norman Werling of Paramus, a Catholic priest. Father Werling, in a notarized report, contends that the Schrader signature on the check was written by Mr. Skevin.

Mr. Schrader, currently unemployed, also maintains that Mr. Skevin still owes him some $15,000 on the out-of-court settlement.

Mr. Sokal said that all claims had been paid and that money Mr. Schrader claims is due him went to pay an outstanding debt owed to Mr. Skevin by the elder Mr. Schrader.

Mr. Schrader maintains that he had never agreed to pay for his father's debt out of funds earmarked for him and that he was improperly charged $5,500 for a malpractice proceeding against Hackensack Hospital that never materialized.

A copy of the contract between Mr. Schrader and Mr. Skevin, drawn nearly two years after the accident at the younger Mr. Schrader's insistence, shows a fee breakdown that does not follow prescribed percentages.

According to the New Jersey Bar Association in Trenton, fees for personal-injury cases prior to January 1984, applicable to the Schrader contract, are as follows:

An attorney is permitted to charge up to 50 percent of the first $1,000 in the settlement; 40 percent of the next $2,000, 33⅓ percent of the next $47,000; 25 percent of the next $50,000; 20 percent of the next $150,000 and 10 percent of any amount exceeding $250,000.

Mr. Schrader's contract follows the fee requirements along the first three points; however, instead of indicating a breakdown of 25 percent of $50,000 and 20 percent of the following $150,000, it states a 25 percent portion of $150,000 followed by 10 percent of amounts over $250,000 (creating the $50,000 gap).

Mr. Schrader said that the attorney also had taken 50 percent of a property damage settlement of $500 in excess of $250,000, when he was entitled to 10 percent, or $50.

A review of Mr. Skevin's accounting of the Schrader settlement, according to documents retained by the family, indicates a number of discrepancies on fees due him.

In an overall accounting tabulation issued to Mr. Schrader, Mr. Skevin seeks $59,716 as a fee for personal injury and property settlement. In a summary letter to an attorney hired by Mr. Schrader to recover funds that he claims are due him, Mr. Skevin seeks $57,100 for personal and property damage.

Mr. Schrader said that while he received an itemized listing of Mr. Skevin's disbursements of $12,250 in the case, he was shown receipts for only about $1,200.

Mr. Schrader has yet to be called to testify before the ethics office. ■

North Jersey RECORD
Tuesday, August 13, 1985

Ethics unit may seek disbarment of Skevin

By Susan Edelman
Staff Writer

The state Office of Attorney Ethics may seek to have Hackensack attorney John M. Skevin disbarred, said a[n] official who recently prosecuted Skevin for misconduct.

A confidential hearing was completed last month on complaints that Skevin, a former state legislator, misappropriated nearly $150,000 in client funds. The retired judge who heard the case is expected to issue a report of his findings soon.

Meanwhile, Bergen County Prosecutor Larry J. McClure said his staff may review evidence submitted during the misconduct hearing to determine whether to file criminal charges against Skevin.

Thomas J. McCormick, chief of hearings for the state Office of Attorney Ethics, said that if the judge finds Skevin guilty, his office will ask that Skevin be disbarred.

"I want to see this guy get what he deserves, at least in my opinion," said McCormick, who presented the case against Skevin at the hearing.

In late 1983, McClure's office declined to charge Skevin with forging a $59,000 check issued as part of a settlement to one of Skevin's client's, John D. Schrader. Schrader's lower leg was amputated after an accident involving a drunken driver.

At the time, the prosecutor said he declined to press charges because of a sworn statement by Skevin's secretary that Schrader had signed all the settlement checks in her presence. During the four-day hearing last month, however, Skevin admitted that he had signed the $59,000 check. Skevin said he had Schrader's oral authorization, which Schrader denied.

Meanwhile, Schrader, 26, and his father, James Schrader, 55, of Teaneck, have complained that their rights were violated because they were denied permission to testify against Skevin or to attend the misconduct hearings.

Skevin was allowed to take the witness stand to defend himself. But the Schraders said that when they showed up July 16 to testify against Skevin, they were asked to leave.

"I just don't think it's fair," said the younger Schrader, who had lodged a complaint against Skevin more than two years ago.

"How can you file a complaint against somebody, and when the time comes for you to tell what the individual did wrong, they refuse to let you testify? What's the point of filing a complaint?"

Several lawyers familiar with New Jersey's attorney-discipline system said people who file grievances against attorneys usually are considered principal witnesses in the hearings. The lawyers also cited rules stating that grievants have a right to be present at all times during the hearings.

In Skevin's case, the retired judge conducting the hearings forbade McCormick to call either of the Schraders as a witness.

Participants said the former Superior Court

See SKEVIN, Page C-2

Disbarment of Skevin sought for handling of client funds

FROM PAGE C-1

judge, Ward J. Herbert of Newark, ruled that testimony by the Schraders was unnecessary because relevant evidence on their position already was on the record.

The four-day hearing was held at the law offices of McCarter & English in Newark, where Herbert practices law. Herbert presided over the Skevin hearing as a volunteer "special ethics master" appointed by the state Supreme Court.

Herbert is expected to issue a report of his findings to the state Disciplinary Review Board, a panel that makes recommendations to the state Supreme Court on disciplining attorneys. Herbert was on vacation last week and could not be reached for comment.

In a 1979 ruling, the Supreme Court stated that attorneys who are found to have misappropriated client funds should be disbarred in almost all instances.

Skevin, once a powerful Democrat, served two years in the Assembly and eight years in the state Senate before being defeated in his bid for a third term in 1981.

Skevin's misconduct hearings involved complaints by two other clients besides the Schraders and a general charge that Skevin tampered with money held in trust for them and other clients.

"We believe Skevin was using the trust account as his personal bank," said McCormick. "He was making disbursements to himself, drawing from his clients' funds."

Skevin maintains that his problems stemmed from sloppy bookkeeping rather than any design to misappropriate client money.

His attorney, Leon J. Sokol of Hackensack, has said Skevin found it "convenient" to mix personal funds he wished to invest with office financial accounts. He said Skevin saw such transactions as "loans from one business entity to another."

Sokol declined to discuss specific complaints but emphasized that Skevin has taken steps to pay clients all the money due them.

The Office of Attorney Ethics announced the allegations in June 1984, when it sought unsuccessfully to have Skevin suspended pending a resolution of the case.

Instead of suspending Skevin, the state Supreme Court appointed Raymond F. Flood, a Hackensack attorney and former first assistant Bergen County prosecutor, to monitor Skevin's law practice.

John Schrader had hired Skevin to file a lawsuit against a drunken driver who struck him June 2, 1979, as he was standing in the Little Ferry traffic circle while trying to move his disabled car. Both of his legs were severely crushed and broken. His left leg had to be amputated below the knee. He has undergone numerous operations to repair the damage.

Skevin filed a lawsuit on Schrader's behalf and arranged various settlements amounting to $250,500.

Besides accusing Skevin of forging his signature on the $59,000 check, one of several received in the settlements, Schrader complained that Skevin withheld the money. Schrader said he discovered that Skevin had cashed the check and deposited it in his bank.

Schrader further complained that Skevin, who took $57,000 as a fee, charged more than state law allows. He also alleged that Skevin billed him for about $10,000 in undocumented expenses.

After Schrader filed a complaint with the state Supreme Court's local ethics committee, Skevin made further payments to Schrader.

Later, Schrader hired another attorney, Eugene Callahan of Hackensack, who arranged a settlement in which Skevin agreed to pay Schrader an additional $14,000. As part of the settlement, Schrader agreed to drop all monetary claims against Skevin, including those in the ethics complaint.

McCormick said that settlement between John Schrader and Skevin also played a part in Judge Herbert's refusal to allow the Schraders to testify.

McCormick said the judge apparently concluded that Schrader had relinquished his right to pursue his ethics complaint. However, rules governing ethics complaints state that they cannot be withdrawn.

Even if Schrader had waived his rights, McCormick said, the Office of Atttorney Ethics would take up the complaint.

"It's like telling a prosecutor, I want to dismiss a criminal complaint; I've been satisfied in a civil settlement," McCormick said. "There's a public interest that goes beyond a personal injury to the individual."

McCormick said he believes Schraders have grounds to ap but that he believes his office sented an adequate case.

"I sympathize with them," he of the Schraders. "I would have l to have seen them have their da court. They could have gotten t viewpoint on the record, and at l vented their spleen."

Sokol called the judge's ruling rect.

Sokol said the other clients filed complaints against Skevin did not testify.

THE STAR LEDGER

Saturday, May 31, 1986

Disbarment asked for former legislator

By ROBERT G. SEIDENSTEIN

An attorney disciplinary review board has recommended that former state Sen. John Skevin be disbarred for mishandling funds he was holding in trust for clients.

The recommendation, which was made public yesterday, sets the stage for a state Supreme Court hearing on Skevin's future as an attorney. The court has scheduled the hearing for Sept. 8.

In the meantime, Skevin will be permitted to continue practicing law under the supervision of another attorney. The supervision was imposed on him by the high court in 1984.

Skevin practices law in Hackensack. He was elected to the Assembly in 1965 on the Democratic ticket and first elected as a senator in 1973. He lost his Senate seat in the 1981 election.

The disciplinary review board's report noted that Skevin "has admitted that he consciously commingled his personal funds with his trust account funds, but that no client was injured as a result."

The board, however, rejected Skevin's defense. "It is clear that he used clients' funds. His 'unauthorized temporary use' for his own purpose, regardless of whether he derived any personal gain, is misappropriation. The record demonstrates that ... (his) trust account had substantial deficit balances throughout 1982."

The board added, "No attorney can remain in perpetual, blissful ignorance of trust account shortages running over $100,000 unless he knowingly chooses not to see."

It noted, "The legal profession is unique in that its practitioners are entrusted with millions of dollars of the funds of others without the requirement of bonding or other direct supervision. The basis for this trust is the presumption that attorneys ... will discharge their fiduciary obligations both ethically and responsibly. The public is entitled to no less. Professed ignorance of basic record-keeping will, in the future, be viewed skeptically as an excuse for imperiling the integrity of client trust funds."

The board said Skevin mishandled the funds of a number of clients, including a man who had his leg amputated as a result of an accident. Skevin had obtained a $250,000 settlement for the accident victim. The victim later had to hire another attorney to represent him in his efforts to get all the money he claimed he was due from Skevin.

At a hearing in 1984, Leon Sokol, Skevin's attorney, said the charges against the former lawmaker involved "sloppy bookkeeping."

Thomas J. McCormick argued the Skevin case to the disciplinary board on behalf of the Office of Attorney Ethics.

Skevin: from clout to likely disbarment

By Harvey Fisher
The Record's Trenton bureau

TRENTON — In the 1970's, John M. Skevin was riding high as one of Bergen County's most powerful Democrats and a lawyer whose business kept growing. Since then, he has lost his political clout and now appears on the verge of being disbarred.

A special board that oversees attorney ethics made public Friday a scorching report recommending that the former state senator be banned from practicing law because he repeatedly misappropriated his clients' money.

"It is clear that he used clients' funds," the board said. "His unauthorized temporary use for his own purpose, regardless of whether he derived any personal gain, is misappropriation."

The recommendation from the Disciplinary Review Board, a nine-member panel that includes six lawyers, was delivered to the New Jersey Supreme Court, which ultimately will determine Skevin's fate.

Skevin, who lost his Senate seat in 1981 and failed in a political comeback attempt two years later, has been ordered to appear before the Supreme Court Sept. 8 to give reasons why his attorney's license should not be lifted.

He could not be reached for comment about the board's recommendation.

The Supreme Court has modified recommendations from the Disciplinary Review Board in the past, but the board said its conclusion that Skevin should be disbarred is tied directly to guidelines handed down over the years by the high court.

The Supreme Court ruled in 1979 that disbarment is automatic whenever lawyers are shown to knowingly have misappropriated or misused funds in their clients' trust accounts.

Under regulations in effect since 1967, trust accounts are never to be used by attorneys for private purposes. The board found that for at least 13 successive months beginning in January 1982, Skevin's trust accounts showed shortages ranging from $12,469 to $133,476. It said he made unauthorized loans from the accounts, at times inappropriately combined at least $1 million of his own money with the clients' funds, and failed to maintain required records.

The review board said Skevin knew what he was doing when he dipped into those accounts or combined his own funds with them. Probers in the past said Skevin used the combined funds much like his own personal bank account for real-estate ventures.

Leon Sokol, Skevin's attorney, has said Skevin reimbursed his clients for all shortages in their accounts.

Charges of unethical conduct were first filed against Skevin 38 months ago. But in a 1984 decision considered somewhat unsual, the Supreme Court declined to temporarily suspend Skevin pending the completion of a full probe, even though investigators had said there was sufficient evidence to

(Continued on App. 38)

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John M. Skevin
Excoriated by ethics panel

warrant immediate suspension.

Now, however, time may be running out for the man who spent two years in the state Assembly and eight in the Senate, and was a member of a powerful committee that reviewed the nominations of judges and prosecutors.

Only a few months ago, the high court again left virtually no escape from disbarment for lawyers who misappropriate funds of clients.

In that decision, the court said it is irrelevant if the money is used for good or bad purposes, for the benefit of the lawyer or others, or even if the attorney intended to return the funds or did, in fact, return the money.

The 59-year-old Skevin, who has a law office in Hackensack, has been beset by personal and professional problems in recent years. His first marriage ended after 24 years, there has been serious illness in the family, and Skevin himself has undergone psychiatric counseling. Court records further show his law business has shrunk from the days when his political clout apparently helped attract numerous new clients.

The board said Skevin knew his trust accounts were in the red for more than a year. "No attorney can remain in perpetual, blissful ignorance of trust account shortages running over a hundred thousand dollars unless he knowingly chooses not to see," the board declared.

"Respondent's [Skevin's] studied ignorance is not credible," the board added. "To restate an old truism: 'Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to confute him.'"

The ethics probe involved complaints brought by three former clients about the way Skevin handled their cases and their funds.

One of the clients, John Schrader of Teaneck, complained in March 1983 that despite his requests to Skevin, the lawyer had not given him a full accounting and all the money due from the settlement of an accident case.

Records also show Skevin signed Schrader's name on a check made out to Schrader. Skevin contends he received Schrader's permission to do so, but Schrader denies it.

No excuses for lawyers who violate client trust

By HERB JAFFE

The State Supreme Court is holding fast to a standard it adopted in 1979 and reinforced earlier this year, that lawyers who dip into their client trust funds must face disbarment.

As a result, the court has removed five persons from the profession within the last three weeks, including an entire law firm of three.

Under the state's constitution, the Supreme Court is responsible for disciplining lawyers who violate the legal code of ethics.

Since January, the court has removed 12 lawyers from the practice of law for improperly using client funds. During that period, two other lawyers were disbarred for reasons other than misappropriation.

The court also has scheduled a hearing on Sept. 8 to determine whether former State Sen. John M. Skevin, Bergen County Democrat, should be similarly disbarred for misappropriation of client funds.

Skevin, against whom charges of unethical practices have been pending for almost 3½ years, has been recommended for disbarment by the state's Disciplinary Review Board. The board's disbarment recommendation to the state Supreme Court affirmed a similar finding by the county ethics committee.

The court has permitted Skevin to continue to practice law until it decides his discipline at some point after the September hearing.

David E. Johnson Jr., director of the state's Office of Attorney Ethics (OAE), said that eight of the 14 who have been disbarred this year involved voluntary actions, a procedure that generally avoids the further disgrace of expanded notoriety which accompanies court disbarment proceedings. The OAE is the investigative and prosecutorial arm of the Supreme Court.

The ratio of disbarments for the misappropriation of funds held in lawyer trust accounts is running considerably higher thus far than in previous years, according to statistics provided by Johnson.

The recent annual report of the OAE said that 24 attorneys were disbarred last year, of which 13 were for misappropriation of funds. In 1984, there were 26 disbarments of which 13 again were for misappropriations.

Among the 12 persons already disbarred for misappropriation in 1986 were three lawyers of the Monmouth County firm of Shultz and Fleischer. In a 6 to 1 opinion, the Supreme Court found Edward L. Fleischer, H. Barry Shultz and Jay L. Schwimer to have "knowingly used clients' funds for their own benefit."

The Disciplinary Review Board, which reviews the findings of ethics committees before they are referred to the Supreme Court, "found overwhelming evidence that the attorneys had intentionally misappropriated clients' funds."

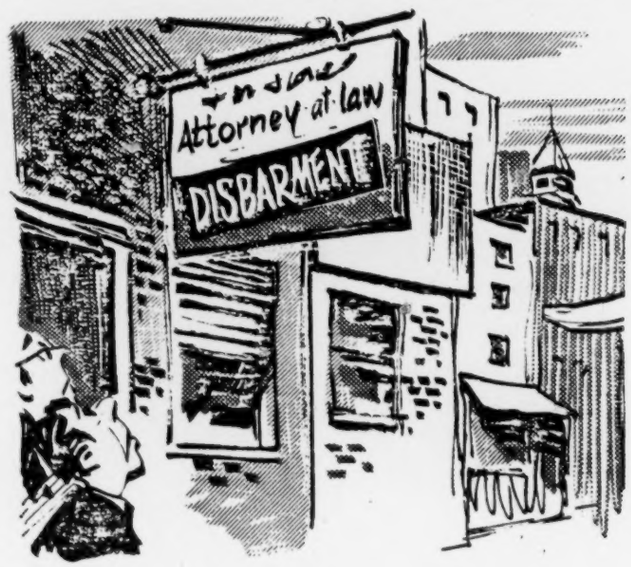
According to the disbarment opinion of the Supreme Court:

"(The three) formed their law firm in 1979 and struggled with a marginal law practice into the summer of 1981, when they terminated the employment of their bookkeeper.

"Left to their own devices, they ceased using their operating account, which was subject to a levy by a judgment creditor, and began to use their trust account as the sole firm bank account."

The opinion added that Fleischer's testimony "makes painfully clear" that the three "knowingly comingled the operating and trust accounts to meet firm expenses, and on several occasions they wrote checks that were returned for insufficient funds."

The opinion said that "overdraft balances in their trust account are attributable to an invasion of specific clients' funds." Citing its 1979 benchmark opinion for matters that involve misappropriation of client funds, called "In re Wilson," the court disbarred the three.



The Wilson opinion established a definition for misappropriation, which according to the ruling means "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom."

Earlier this year, the court reaffirmed In re Wilson and broadened the standards for determining misappropriation in another disciplinary opinion called "In re Noonan." Under the Noonan opinion, the court further detailed "the misappropriation that will trigger automatic disbarment under In re Wilson."

It stated that in almost all cases disbarment for misappropriation "consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's

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Sunday Star-Ledger
June 22, 1986

money and knowing that the client has not authorized the taking."

"It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client," the Noonan opinion stated, adding:

"Nor does it matter that the pressures on the lawyer to make the money were great or minimal.

"The essence of Wilson is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, are irrelevant: It is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment."

Another recent disbarment for misappropriation involved John R. Lennan of Tenafly who, "on numerous occasions" the court's opinion said, "drew checks to himself out of the trust funds of four clients."

The court said that an OAE auditor found "there was a pattern of taking trust funds held as deposits on real estate closings and replacing them before the closing occurred."

Under the Wilson ruling, even temporary use of the client funds and ultimate repayment to the attorney trust account is reason for a lawyer to be disbarred, as was the case in the Lennan matter.

The fifth recent disbarment involved Arnold E. Brown of Englewood, whose trust account was found by the OAE to be "frequently deficient." The court said that "Brown continually invaded the trust funds of one client to pay another."

In fact, its opinion stated, "there is no excusing Brown's constant dipping into this trust account for four and a half years."

According to the Disciplinary Review Board's recommendation to the Supreme Court that Skevin be disbarred, the former state senator "has admitted that he consciously comingled his personal funds with his trust account funds." The finding by the board added:

"It is clear that he used clients' funds. His unauthorized temporary use for his own purpose, regardless of whether he derived any personal gain, is misappropriation."

And in its lengthy decision dealing with the numerous charges against Skevin by clients, the board commented that "the legal profession is unique in that its practitioners are entrusted with millions of dollars of the funds of others without the requirement of bonding or other direct supervision."

"The basis for this trust is the presumption that attorneys, as officers of the court, will discharge their fiduciary obligations both ethically and responsibly," the finding stated.

"The public is entitled to no less."

The Office of Attorney Ethics also has found that attorneys who practice in certain areas of law are more prone to commit unethical acts than others, according to the OAE's annual report.

"Statistics show that practitioners in certain areas are more grievance-prone than those in other areas," the report stated. "An analysis of all grievances filed during calendar year 1985 shows that practices in six areas of the law generate almost three-quarters of all the grievances that are filed," it added, explaining:

"In order of greatest frequency, they are real estate, 16.4 percent; negligence, 15.7 percent; domestic relations, 15.1 percent; estates, 10.2 percent; criminal law, 7.5 percent, and general litigation, 7.1 percent."

The report also said that four of the six most grievance-prone areas of the law "are the same fields which are most frequently cited as responsible for malpractice claims."

The OAE pointed out that the American Bar Association's National Legal Malpractice Data Center recently conducted a study of 18,486 lawyer malpractice claims and found that lawyers face the greatest risk of malpractice claims when practicing in the following legal fields:

"Real estate, 24.9 percent; personal injury, plaintiff, 24 percent; collection and bankruptcy, 12.3 percent; family law, 7.8 percent, and estate and probate, 7.1 percent."

According to the report, "misappropriation continues to be responsible for the greatest amount of public discipline," representing 39 percent of all lawyer disciplinary actions in New Jersey in 1985. Criminal conviction of lawyers was second, representing 22 percent of all sanctions against attorneys that ranged from disbarment to suspension.

Supreme Court, U.S.
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No. 86-1334

In The
Supreme Court of the United States
October Term, 1986

JOHN M. SKEVIN,

Petitioner,

v.

SUPREME COURT OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Court should grant a Petition to review an order of a State court of last resort disbarring an attorney after a plenary hearing and after a factual finding, based upon circumstantial but virtually undisputed evidence, that the attorney knowingly misappropriated client trust funds and when

(a) Questions One and Two of the Petition were not raised below, and when

(b) Question Three of the Petition is without merit.

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OPINION BELOW AND RELATED PROCEDURAL HISTORY

The opinion below is reported at *Matter of Skevin*, 104 *N.J.* 476 (1986). (Reprinted at Petitioner's Appendix A; hereafter referred to as Pet. App.). Thereafter, a stay of the disbarment order was sought from the New Jersey Supreme Court and granted, but only to allow Skevin time to apply to the Court for a stay. (Resp. App. at 2). An application to the Court for a stay was granted December 23, 1986 by Justice William J. Brennan, Jr. (App. D at 27).

JURISDICTION

The judgment of the New Jersey State Supreme Court was entered November 14, 1986. The jurisdiction of the Court to review a final judgment of a state court of last resort is invoked pursuant to 28 *U.S.C.* § 1257(3). The respondent asserts the Court is without jurisdiction to review the federal questions raised in Questions One and Two of the Petition, inasmuch as these questions were not raised below.

STATE CONSTITUTIONAL PROVISION INVOLVED

N.J. Const (1947), Art. VI, § II, ¶ 3 provides as follows:

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject

to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

———o———

STATEMENT OF THE CASE

Petitioner John Skevin was admitted to the New Jersey Bar in 1956. He was disbarred by order of the respondent, the Supreme Court of New Jersey, on November 14, 1986 because he knowingly misappropriated client trust funds. (Pet. App. B at 17).

Skevin was a single practitioner, with at times one or two associates, who had been active in state politics. In 1984, a nine-count, amended disciplinary complaint was filed against Skevin. The amended complaint charged numerous disciplinary infractions, including inappropriate advancement of settlement funds, *Matter of Skevin,* 104 *N.J.* 476, 480, 481 (1986) (Pet. App. A at 4, 6); loaning monies to a client, *id.* at 481 (Pet. App. A at 6); failing to obtain fee agreements; failing to advise of alternative fees, and miscalculating contingent fees, *Id.* at 481 (Pet. App. A at 6). The amended complaint also charged instances of overdrafts of Skevin's business, personal and trust accounts. *Id.* (Pet. App. A at 6).

Some of these charges were dismissed and none were of such a nature to warrant disbarment. *Id.* at 478-81 (Pet. App A at 1-6). Three counts of the amended com-

plaint, however, charged knowing misappropriation of client trust funds.

The facts relating to these three counts, which were for the most part stipulated to by the parties, were that Skevin was out-of-trust for substantial periods of time between 1982 and 1983. In one six month interval, for example, Skevin was out-of-trust the *entire period,* and for sizeable sums: in June, 1982, $12,469.99; in July, 1982, $70,267.31; in August, 1982, $72,252.18; in September, 1982, $65,618.20; in October, 1982, $92,552.27; in November, 1982, $114,704.29, and in December, 1982, $133,476.40. *Id.* at 483 (Pet. App. A at 8).

The shortfall in Skevin's trust account was not immediately apparent because Skevin regularly commingled personal monies with trust funds. He claimed, for example, that during 1982-1983 he deposited an aggregate of nearly $1 million dollars of personal monies into his trust account. *Id.* at 483 (Pet. App. A at 8). Skevin, however, kept no contemporaneous records that would indicate the amount of personal funds in the trust account. *Id.* at 402-03 (Pet. App. A at 7-8). The evidence also revealed that Skevin withdrew monies from his trust account as reimbursement for his fees and costs well in advance of his receipt of settlement funds. *Id.* at 479-80 (Pet. App. A at 4). On several occasions, he disbursed money to one client, John Schrader, prior to his receipt of settlement funds. *Id.* at 479-80 (Pet. App. A at 4). While all these facts were virtually undisputed, Skevin denied, and continues to deny, that he *knowingly* misappropriated trust funds.

Since 1948, the Supreme Court of New Jersey has been vested with the exclusive power to regulate the admission, conduct and disbarment of attorneys licensed to practice law in the State. *N.J. Const.*, (1947), Art. VI, § II, ¶ 3. Pursuant to this power, the Supreme Court has enacted a comprehensive scheme regulating the conduct of all practicing attorneys. As part of this scheme the Rules of Professional Conduct of the American Bar Association, as supplemented by the Supreme Court, have been incorporated into the court rules. *N.J. Ct. R.* 1:14. These Rules require, *inter alia,* the segregation of client monies and an attorney's own funds. *N.J. Ct. R.* 1:14, Appendix I at RPC 1.15(a).[1]

The Supreme Court has also imposed very specific rules regarding the maintenance of trust accounts. Any such account must be clearly marked as a trust account and be maintained in a financial institution in New Jersey authorized by the Supreme Court to hold trust funds. A balance sheet listing every trust account deposit and withdrawal must be maintained, separate from other attorney accounts. *N.J. Ct. R.* 1:21-6(b)(1); *N.J. Ct. R.* 1:21-6(a). In addition, for every client for whom funds are escrowed, the attorney must maintain a separate led-

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[1]For the sake of convenience, all citations to the Supreme Court's regulatory scheme are to the court rules currently in force. These rules include amendments made after the time-period at issue in the instant action. No significant change has been made in the substance of the rules pertinent to this matter, however. *See In the Matter of Skevin, supra,* 104 *N.J.* at 482 (Pet. App. A at 7).

ger detailing every financial transaction made on the client's behalf. *N.J. Ct. R.* 1:21-6(b)(2). A "regular trial balance of the individual client trust ledgers shall be maintained." *Id.* An attorney's trust account records must be made available for inspection upon demand by the Office of Attorney Ethics, the disciplinary investigation and prosecutorial arm of the Court. *N.J. Ct. R.* 1:21-6(c); *N.J. Ct. R.* 1:20-2.

The regulations promulgated by the Court regarding the maintenance of attorney trust accounts are stringent. Properly adhered to, however, they insure that an attorney is aware at all times of the aggregate sum of money in his trust account as well as the current balance of the monies held in trust on behalf of each client. The rigor of these regulations is warranted because the Court, in 1979, put the Bar on notice that the sanction for knowing misappropriation of client funds would "almost invariab[ly]" be disbarment. *In re Wilson,* 81 *N.J.* 451, 453, 409 *A.*2d 1153, 1154 (1979). Thereafter, the Court ruled that some sanction short of disbarment was appropriate whenever an attorney's misappropriation of his client's funds was not knowing, but was, rather, the product of inadvertent error or neglect. *Matter of Noonan,* 102 *N.J.* 1167, 506 *A.*2d 722 (1986).

Because Skevin denied that he knowingly misappropriated client funds, the key question before the Supreme Court was whether his conduct, which resulted in a six-month trust account shortage that at times exceeded $100,000, coupled with the comingling of approximately one million dollars of personal funds and the failure to main-

tain contemporaneous trust account records, evidenced knowing misappropriation of client funds, for which the sanction of disbarment would be warranted, *see In re Wilson, supra,* or evidenced inadvertent error or neglect, for which some sanction other than disbarment might be suitable. *See Matter of Noonan, supra. Matter of Skevin, supra,* 104 *N.J.* at 484 (Pet. App. A at 10). After a plenary fact-finding hearing conducted by a Special Master, after a report and recommendation by a state-wide disciplinary board, and after respondent's own review of the record, the Supreme Court found that Skevin's conduct was the result of knowing misappropriation of funds and ordered his disbarment. *Id.* at 477 (Pet. App. A at 1). No petition for rehearing was sought. By order of December 2, 1986, however, disbarment was delayed until December 16, 1986. (Resp. App. 1). On December 16, 1986, Skevin sought a stay of the Order from the New Jersey Supreme Court to allow him time to make an application to this Court for a stay, prior to filing a Petition for Certiorari. His application was granted and a stay of the Order was entered until December 19, 1986. (Resp. App. 2). On December 23, 1986, Justice William J. Brennan, Jr., granted Skevin's application for a stay pending disposition of this Petition. (Pet. App. D at 27).

Skevin raises two separate federal constitutional claims in support of his petition. The first is a substantive due process claim that he may not be disbarred on the basis of circumstantial evidence offered to prove state of mind and absent an inquiry into his "current character and fitness to practice law" (Petition at Questions One and Two). The next is a procedural due process claim that his disbarment proceedings were fatally infected by prejudicial

pretrial publicity. The respondent contends the Petition should be denied because it raises federal questions which were not presented below and which are, in any event, meritless.

REASONS FOR DENYING THE WRIT

THE COURT IS WITHOUT JURISDICTION TO CONSIDER QUESTIONS ONE AND TWO OF THE PETITION AND, IN ANY EVENT, ALL THE QUESTIONS ASSERTED ARE WITHOUT MERIT.

A. The Issues Raised In Questions One and Two of the Petition Were Not Raised Below and Are In Any Event Without Merit.

Skevin claims a substantive due process right not to be disbarred absent a showing that he is, at the time the sanction is imposed, morally and professionally unfit to practice law. He cites as the source of this federal constitutional right *Schware v. Board of Bar Examiners of New Mexico*, 353 *U.S.* 232 (1957) and *Bell v. Burson*, 402 *U.S.* 535 (1971). He also claims, erroneously, that the respondent conclusively presumes knowing misappropriation of client funds from evidence of actual misappropriation, in violation of his federal due process rights. *See* Petition Questions One and Two; Pet. Brief at 12-17. Neither of these federal claims was presented to the New Jersey Supreme Court and, hence, the Court lacks jurisdiction to consider them now.

28 *U.S.C.* § 1257 permits review of the judgment of a state court of last resort by Petition for Certiorari only when a federal question has been raised in the state court

proceeding. 28 *U.S.C.* § 1257(3). *Cardinale v. Louisiana,* 394 *U.S.* 437, 439 (1969). The federal question asserted, moreover, must be "substantial." *Palmer Oil Corp. v. Amerada Corp.,* 343 *U.S.* 390 (1952).

The New Jersey Supreme Court did not expressly consider or resolve any federal constitutional questions in its decision to disbar John Skevin. *Matter of Skevin, supra,* 104 *N.J.* 476. (Pet. App. A). In such an instance, the petitioner has the burden of demonstrating to the Court, by certificate from the state supreme court, *Herb v. Pitcairn,* 324 *U.S.* 117, 128 (1945), or by specific reference to the record or otherwise, *R.* 21.1(h), that the federal claim was actually drawn into question below. *Exxon Corp. v. Gayerton,* 462 *U.S.* 176, 181 n. 3 (1983). Where, as here, the state court has failed to comment on the purportedly raised federal claim, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York,* 394 *U.S.* 576, 582 (1969).

Skevin attempts to meet his burden by pointing out that on three different pages of the 62-page brief he submitted below he capsulized the argument he now makes to the Court in support of Questions One and Two of his Petition. He also asserts that at one point of his argument below he specifically referred to "due process." (Pet. Brief at 20 referring to Resp. App. at 36, 37 and 42).

The brief Skevin submitted below is set forth in full in Respondent's Appendix at 4-58. A review of the Table of Citations reveals that not a single case relied upon by Skevin now in support of his substantive claim, namely,

Schware, supra, or *Bell v. Burson, supra,* was cited to the New Jersey Supreme Court. (Resp. App. at 6-8). Indeed, only three of the forty cases cited to the New Jersey Supreme Court are from any federal court at all, and only two of those, *In re Ruffalo,* 390 *U.S.* 544 (1968) *reh. den.* 391 *U.S.* 961 (1968) and *Sheppard v. Maxwell,* 384 *U.S.* 333 (1966) are decisions of the Court. (Resp. App. 6-8). Further, the reference to "due process" at page 42 of the brief is unaccompanied by any specific reference to the Due Process Clause *of the Fourteenth Amendment.* (Resp. App. at 42) (*See also* Table of Citations, Resp. App. at 6-8: no citation to any federal constitutional provision).

The Court has long assumed that non-specific references in legal argument to "due process" are references to state constitutional law in those states which have a due process provision in their state constitutions. *Bowe v. Scott,* 233 *U.S.* 656, 664-65 (1914); *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 *U.S.* 861, 865-66 (1974). New Jersey has a due process provision in its constitution. *N.J.* Const. (1947) Art. I, ¶1. Thus, Skevin has not met his burden of proving that the federal constitutional questions raised in Questions One and Two of his Petition were raised below.

Skevin contends, however, that he notified the New Jersey Supreme Court of the federal constitutional claims he now raises in his Petition one month after the disbarment order was issued, on December 16, 1986, when he applied to the Supreme Court for a stay of the disbarment order pending consideration of his Petition for Certiorari. He notes that attached to his application for a stay was a

"near-final draft" of his application to Justice William J. Brennan, Jr., for a stay and that this draft raised all his federal claims. (Pet. Brief at 21). Raising a federal question after final judgment by the state court of last resort, however, is timely only when the state court's decision is unexpected, and the petitioner could not reasonably have anticipated the federal question. *Pruneyard Shopping Center v. Robins,* 447 *U.S.* 74, 85-86 n. 9 (1980); *Brinkerhoff-Faris Trust Co. v. Hill,* 281 *U.S.* 673, 677-78 (1930). Here Skevin knew from the outset that the key question in his case was whether the evidence presented proved his knowing misappropration of funds for which disbarment was the likely sanction. *In re Wilson, supra,* 81 *N.J.* 451. Thus, it is submitted, Skevin has failed to demonstrate to the Court that he properly raised the federal question presented in Questions One and Two of the Petition. It is submitted, therefore, that certiorari to consider Questions One and Two should be denied.

In any event, the federal claims asserted in Questions One and Two of the Petition are without merit and do not warrant this Court's review. Skevin's argument is that an attorney disbarment proceeding is tantamount to being charged with a crime, citing *In re Ruffalo,* 390 *U.S.* 544 (1968) (attorney disbarment proceeding quasi-criminal in nature) and that thus, as a matter of federal due process applicable to the states by the Fourteenth Amendment, an essential element of the offense of knowing misappropriation of trust funds must be a specific intent to misappropriate for an illegal purpose, citing *Morissette v. United States,* 342 *U.S.* 246 (1952). Skevin further contends, erroneously, that the Supreme Court of New Jersey

conclusively presumes the element of "knowing" misappropriation funds from evidence of actual misappropriation of funds in contravention of *Sandstrom v. Montana,* 442 *U.S.* 510 (1979) (presumption which operates to shift burden of persuasion to defendant of an element of the offense charged in a criminal case violative of due process). *See also United States v. United States Gypsum Co.,* 438 *U.S.* 422 (1978); *Mullaney v. Wilbur,* 421 *U.S.* 684 (1975). (*See* Pet. Brief at 14-17).

Attorney disbarment proceedings have at various times been characterized as quasi-criminal in nature, *In re Ruffalo, supra;* civil in nature, *Randall v. Brigham,* 7 *Wall.* 523, 19 *L.Ed.* 285 (1869); *Ex Parte Wall,* 107 *U.S.* 265 (1883) or *sui generis, In re Logan,* 70 *N.J.* 222, 358 *A.*2d 787 (1976) reh. 71 *N.J.* 583, 367 *A.*2d 419. From the standpoint of federal constitutional analysis, however, the difference between these characterizations is one of semantics only; whether a disbarment proceeding is viewed as quasi-criminal in nature, *Ruffalo, supra,* or as a civil proceeding involving the loss of a federally protected property right in the license to practice a regulated profession, *Barsky v. Board of Regents of N.Y.,* 347 *U.S.* 442 (1953) (revocation of medical license), the substantive due process analysis is the same: is the state regulation authorizing disbarment rationally related to a legitimate state objective, *United Mine Workers v. Dist. 12, Illinois Bar Assoc.,* 389 *U.S.* 217, 222 (1967).

The regulation of the legal profession has long been deemed by the Court to be a matter of special state re-

sponsibility. The Court has stated that state restrictions on the practice of law are constitutional as long as they bear a rational connection to this concededly legitimate state goal. *Ohralik v. Ohio State Bar Assoc.*, 436 *U.S.* 437, 488-89 (1978), *United Mine Workers v. District 12, Illinois State Bar Assoc.*, 389 *U.S.* 217, 222 (1967).

In New Jersey, all power to regulate the legal profession is vested in its Supreme Court. *N.J. Const.* (1947) Art. VI, § II, ¶ 3. In 1979, the Court adopted a policy that the sanction for knowing misappropriation of funds would "almost invariab[ly]" lead to disbarment. *In re Wilson, supra,* 81 *N.J.* 451, 453, 409 *A.*2d 1153, 1154 (1979). The practice of ordering disbarment as a sanction for knowing misappropriation of funds was not new in this State. *See In re Ryan,* 60 *N.J.* 378, 290 *A.*2d 140 (1972); *In re Gavel,* 22 *N.J.* 248, 125 *A.*2d 696 (1956). The significance of *Wilson* was that for the first time the Court determined as a matter of policy that the general imposition of the sanction of disbarment for knowing misappropriation of trust funds was the only effective means to preserve the "confidence of the public in the integrity and trustworthiness of lawyers in general" the policy goal the New Jersey Supreme Court identified as "the principal reason for [attorney] discipline." *In re Wilson, supra,* 81 *N.J.* at 456, 409 *A.*2d at 1155.

In adopting this policy the Court carefully examined the mitigating circumstances frequently asserted in misappropriation cases as justification for imposing some sanction short of disbarment. These are, primarily, that the attorney has made restitution; that the attorney has corrected the bookkeeping practices that contributed to the

misappropriation, and the experience, or lack thereof, of the lawyer.

As to restitution, the Court found this "honesty of compulsion," *id.* at 457, 409 *A.*2d at 1156, wanting as a justification for imposing a sanction less than disbarment for one who knowingly misappropriates trust funds:

> Judicial consideration of restitution as a mitigating factor in disciplinary proceedings creates the impression that sanctions are proportioned in accordance with ability to pay, rather than gauged against the seriousness of the misconduct. Furthermore, according significance to restitution leads to an obvious and substantial possibility of unjust discrimination [against those who can not afford to make restitution]. [*Id.* at 459, 409 *A.*2d at 1156-57. *See generally, id.* at 457-459, 409 *A.*2d at 1156-57].

The Supreme Court likewise found assertions that the attorney had reformed sloppy bookkeeping practices, or was otherwise a highly qualified and experienced lawyer, did not outweigh the considerations which favored a policy of disbarment for knowing misappropriation of client funds. Reform of sloppy bookkeeping practices was, in the Court's opinion, "the least that one would expect. Its only significance is that it would be doubly unthinkable to permit resumption of practice by an offending attorney who remained unwilling or unable to set up proper books and records." *Id.* at 459, 409 *A.*2d at 1157. The Court further found the experience and prior outstanding career of a lawyer to be "less important . . . where misappropriation is involved. The offense against common honesty should be clear even to the youngest; and to distinguished practitioners, its grievousness should be even clearer." *Id.* at 460, 409 *A.*2d at 1157 (footnote omitted).

Thus, the New Jersey Supreme Court adopted a policy of "almost invariable" disbarment as a sanction for knowing misappropriation of client funds in order to further its stated aim of preserving the public trust in the legal profession. *Id.* at 453, 409 *A.*2d at 1154. Preserving the public trust in the legal profession is a legitimate exercise of police power. *Oralik, supra; United Mine Workers, supra,* and the New Jersey Supreme Court's virtual disbarment policy is certainly a rational means to achieve this goal. And because the virtual disbarment policy for knowing misappropriation of trust funds is a rationally related means to effectuate a legitimate policy goal, the failure of the New Jersey Supreme Court to require proof of a specific illegal purpose as an element of the charge of knowing misappropriation does not violate the Due Process Clause of the Fourteenth Amendment. Further, *Morissette v. United States, supra,* 342 *U.S.* 246, relied upon by Skevin in support of this argument does not support his proposition. *Morissette* simply stands for the proposition that one cannot, as a matter of federal due process, be sanctioned for *criminal* conduct absent a proof beyond a reasonable doubt of a specific culpable intent and that such specific intent should be construed in a federal penal statute which fails to so expressly state. *Id. Morissette* expressly stated, moreover, that due process does not require proof of specific illegal intent as an element of non-criminal, public welfare regulations. *Morissette v. United States, supra,* 342 *U.S.* at 254-60.

The application of the *Wilson* rule to Skevin's case is not arbitrary; it is amply supported by the evidence. *Schware v. Board of Bar Examiners of New Mexico, supra,* 353 *U.S.* 232. The evidence before the New Jersey Su-

preme Court was that Skevin was substantially out-of-trust for much of 1982-1983; that Skevin commingled nearly $1 million dollars of his personal funds with trust monies during this period and that Skevin kept no contemporaneous financial records. While these facts were undisputed, Skevin denied that he knowingly misappropriated funds. Notwithstanding Skevin's denial, the Court concluded the evidence clearly and convincingly established that Skevin knew he misappropriated funds and ordered his disbarment. *Matter of Skevin, supra,* 104 *N.J.* 476 (Pet. App. A).

Skevin would like the Court to believe that the New Jersey Supreme Court did not engage in any fact finding on the question of whether Skevin knew he misappropriated funds, but, rather, conclusively presumed Skevin knew he misappropriated trust funds simply from evidence of actual misappropriation of trust monies. This is not correct. Evidence of "knowing" is an element of the disciplinary infraction of knowing misappropriation. This element must be proved by clear and convincing evidence. *Id.* at 476 (Pet. App. A at 1). The Supreme Court itself expressly stated that the key question in Skevin's case was whether he knowingly misappropriated funds, which would result in disbarment, or whether the misappropriation was due to inadvertence, which would result in a sanction short of permanent disbarment. *Id.* at 484 (Pet. App. A at 10).

At bottom, Skevin is aggrieved because the New Jersey Supreme Court found he misappropriated funds despite his express denial that he *knowingly* misappropriated client funds. What Skevin is really arguing to the Court is that he may not be disbarred, as a matter of federal con-

stitutional law, absent *direct* evidence of "knowing" misappropriation.[2] It is true that in this case Skevin's state of mind was proved by *circumstantial evidence,* but it is well settled that circumstantial evidence is a perfectly acceptable method with which to prove intent in both criminal as well as civil evidentiary proceedings. *See generally F.R.Evid.* 401; J. McCormick, *Evidence,* 435-36 (2d Ed. 1972).

Skevin also suggests that as a matter of federal constitutional law the requisite criteria for disbarment is "current moral and professional fitness to practice law," relying on *Schware v. Board of Bar Examiners of New Mexico, supra,* 353 *U.S.* 232 (1957). (Pet. Brief at 13). *Schware* does not support this proposition. It simply holds that a decision to deny admission to a bar applicant on the grounds of moral unfitness must as a matter of federal due process be supported by evidence in the record. As discussed, *supra,* the evidence in this case amply supports a finding that Skevin knowingly misappropriated funds. In any event, if knowing misappropriation of funds to the degree engaged in by Skevin is not indicia of moral and prefessional unfitness to practice law, respondent does not know what is.[3]

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[2]Such a standard, of course, would permit a finding of "knowing" misappropriation only in those rare cases in which the attorney actually admitted his misconduct.

[3]Skevin contends that there have been no instances of misappropriation *after* the filing of the amended disciplinary complaint and that, therefore, he may not be disbarred. Certainly, the proper handling of trust monies *after* a disciplinary complaint had been filed does not tend to show whether or not

(Continued on following page)

For all the foregoing reasons, accordingly, the Court should not grant certiorari to review Questions One and Two of the Petition.

B. The Issue Raised in Question Three of the Petition is Without Merit.

Citing *Sheppard v. Maxwell*, 384 *U.S.* 333 (1966), Skevin contends the Supreme Court of New Jersey disbarred him because it was improperly influenced by pretrial publicity, in violation of his federal procedural due process rights. A disciplinary proceeding in New Jersey is normally a three-tiered process. An ethics grievance is initially filed with a District Ethics Committee, a local board which conducts a preliminary investigation and recommends what type of further action, if any, need be taken. *N.J. Ct. R.* 1:20-3. If the Committee determines that unethical conduct occurred for which a private reprimand is an inappropriate sanction, a formal complaint is filed. *N.J. Ct. R.* 1:20-3(f), (h).[4] A plenary hearing is con-

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(Continued from previous page)

an attorney knowingly misappropriated funds *before* the filing of the complaint. In any event, Skevin's improved conduct was only because the Supreme Court required Skevin, *pendente lite*, to practice under the guidance of a proctor who was required to co-sign all checks. *Matter of Skevin, supra*, 104 *N.J.* at 482-483; (Pet. App. A at 8-9; Resp. App. at 3). This requirement is still in force. (Resp. App. at 3). It is not at all clear, furthermore, that Skevin would have been able to avoid misappropriation of trust funds without the proctorship; one proctor advised the Supreme Court of an instance in which he had discouraged Skevin from borrowing money from a client for whom he had just obtained a judgment. (Pet. App. E at 30, ¶ 8). Obviously, Skevin continues to exercise poor judgment when it comes to financial matters involving his clients.

[4]In Skevin's case, the function of the District Committee was performed, at the direction of the Supreme Court, by a special master, who was a retired trial judge. *Matter of Skevin, supra*, 140 *N.J.* at 483 (Pet. App. A at 9).

ducted and the Committee makes a factual finding and recommendation to the Disciplinary Review Board, a statewide committee which makes a *de novo* review of the record and determines whether to adopt, modify or reverse the findings of the Committee. *N.J. Ct. R.* 1:20-4. The matter is then referred to the Supreme Court for review and decision. *N.J. Ct. R.* 1:20-5.

Proceedings before the District Committee (or in Skevin's case, the Special Master), and the Disciplinary Review Board are confidential, *N.J. Ct. R.* 1:20-10(a). However, once a matter is scheduled by the Supreme Court for oral argument for final discipline, "the recommendation of the [Disciplinary Review] Board that is the subject thereof, together with any briefs filed pursuant to an order of the Court, *shall* be made public . . . ." *N.J. Ct. R.* 1:20-10(a)(1) (emphasis added). Grievants and witnesses are absolutely immune from a civil suit as long as they do not breach the confidentiality of the disciplinary process. *N.J. Ct. R.* 1:20-11(b).

Prior to the filing of the amended disciplinary complaint, Skevin had been active in state politics and had served, until 1981, two terms as a state senator. He was a public figure who, at the time of disciplinary hearing, continued to attract public attention.

The first news articles about the disciplinary proceedings against Skevin occurred in June, 1984, after oral argument to the Supreme Court on a motion to suspend Skevin from practice *pendente lite*. (Pet. App. F at 32).[5]

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[5]This motion was denied. *In re Skevin*, 104 N.J. at 483 (Pet. App. A at 9).

As Skevin acknowledges, all disciplinary matters presented to the Supreme Court are conducted in open court, so that the publicity generated by this motion was not a breach of the confidentiality rules of the Court. (Pet. Brief at 7). Two months later, two complainants, John and Joseph Schraeder, breached the confidentiality of the disciplinary process on two separate occasions by making information available, *inter alia,* to a reporter for the New York Times. This occurred after the evidentiary hearing was conducted before the Special Master. (Pet. App. F at 33). The Special Master's report was completed the following spring. This report was also leaked to a reporter who wrote an article about it.[6] Thereafter, when the Disciplinary Review Board referred the matter to the Supreme Court and final argument was scheduled, the report of the Board was made public, as is permitted by the court rules. *N.J. Ct. R.* 1:20-10(a)(1). The Board's recommendation, which occurred at the time that the Supreme Court decided several other disbarment matters, generated attention. (Pet. App. E at 36-40).

Skevin contends this publicity, which occurred over a two year period, was so prejudicial that it prevented the Supreme Court from making an impartial determination of his case and hence violated his federal procedural due process rights, citing *Sheppard v. Maxwell,* 384 *U.S.* 333 (1966). This is not so.

Even in the criminal context, the Due Process Clause safeguards the right to *public* pretrial and trial proceedings. *In re Oliver,* 333 *U.S.* 257 (1948) (criminal defendant

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[6]Skevin does not include this article in his appendix.

has Sixth Amendment right to public trial); *Richmond Newspapers, Inc. v. Va.*, 448 *U.S.* 555 (1980) (public has First and Fourteenth Amendment right of access to criminal trial); *Gannett Co. Inc. v. DePasquale*, 443 *U.S.* 368 (1979) (public has First and Fourteenth Amendment right of access to pretrial criminal proceedings). From the standpoint of federal due process, a closed legal proceeding is the exception, not the rule.

Thus, if Skevin had been charged with a crime instead of a disciplinary infraction, the Due Process Clause would require that the proceedings in his case be open. *Sheppard* only holds that when publicity is of such a nature and degree that it threatens the impartiality of the lay factfinder (*i.e.*, jury), a criminal defendant's constitutional right to a fair trial overrides the public's constitutional right of access. *Sheppard v. Maxwell*, 384 *U.S.* 333 (1966) (defendant entitled to new trial when publicity of a sensational nature while jury trial was ongoing and when presence of media in courtroom so pervasive that it disrupted courtroom proceedings).

Skevin refers the Court to two news articles (Pet. App. F at 33-35) and mentions a third article, which were all written as a result of information improperly leaked to the media, as being unduly prejudicial.[7] These articles appeared well before the Supreme Court heard and de-

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[7]The source of two of these leaks were two complainants John and Joseph Schraeder. (Pet. App. F at 33-35). Skevin wants the Court to believe the Office of Attorney Ethics, the enforcement arm of the Court in disciplinary matters, was responsible for the third leak. (Pet. Brief at 8-9). This is not so. All parties had access to the Special Master's report which was leaked to the press. The source of the leak remains undetermined.

cided Skevin's case. Even assuming *arguendo* that *Sheppard* was applicable in a non-criminal context, these three articles are hardly of a nature to trigger *Sheppard*. Further, Skevin's suggestion that the members of the Supreme Court of New Jersey would not be able to maintain their objectivity and impartiality under such circumstances is specious. For all these reasons, accordingly, the Court should not grant certiorari to review Question Three of the petition.

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CONCLUSION

For the foregong reasons, Court should not grant Skevin's Petition for *certiorari*.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF NEW JERSEY
D-2 September Term 1986

IN THE MATTER OF
JOHN M. SKEVIN, ORDER
An Attorney at Law.

This matter having come before the Court on the application of JOHN M. SKEVIN, seeking a modification of the Order of this Court entered November 14, 1986, and the Court having reviewed the arguments of the parties, and good cause appearing;

It is ORDERED that respondent's disbarment shall take effect Tuesday, December 16, 1986; and it is further

ORDERED that Leon J. Sokol, Esquire, shall serve as proctor of the respondent until the Order of disbarment takes effect, and that as a part of his duties, to be exercised in accordance with Administrative Guideline # 28, said Leon J. Sokol, Esquire, shall oversee all financial transactions of respondent, including the cosigning of all checks, deposits, and withdrawals made during the period provided for by this Order.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 2nd day of December, 1986.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
D-2 September Term 1986

IN THE MATTER OF
JOHN M. SKEVIN, ORDER
An Attorney at Law.

This matter having been duly presented to the Court on respondent's application for a stay of his disbarment pending an application for relief to the Supreme Court of the United States;

It is ORDERED that the disbarment of JOHN M. SKEVIN of Hackensack is hereby stayed through December 19, 1986, provided that an application for emergent relief is submitted to a single Justice of the Supreme Court of the United States before 5:00 p.m., December 17, 1986; and it is further

ORDERED that unless relief is granted by the Supreme Court, the stay provided for by this Order shall terminate at 5:00 p.m. on December 19, 1986, or upon the entry of an Order by a single Justice denying relief, whichever may occur first.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 16th day of December, 1986.

/s/ Stephen W. Townsend
Clerk

SUPREME COURT OF NEW JERSEY
D-2 September Term 1986

IN THE MATTER OF
JOHN M. SKEVIN, ORDER
An Attorney at Law.

This matter having been duly considered by the Court, and good cause appearing;

It is ORDERED that pending the resolution of the petition for a writ of *certiorari* now before the Supreme Court of the United States and until the further Order of this Court, Leon J. Sokol, Esquire, shall continue to serve as proctor to respondent pursuant to Administrative Guideline No. 28.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 28th day of January, 1987.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen W. Townsend
Clerk of the Supreme Court of New Jersey

SUPREME COURT OF
THE STATE OF NEW JERSEY

Docket No. D-14

In the Matter of

JOHN M. SKEVIN
ATTORNEY AT LAW

Previously Before
Disciplinary Review Board
(Decision Rendered
May 23, 1986)

BRIEF ON BEHALF OF RESPONDENT, JOHN M. SKEVIN, ESQ.

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On the Brief

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DR 9-102 (C) 13

PRELIMINARY STATEMENT

Unlike most of the reported cases involving misappropriation of trust funds, this case does not involve their intentional use for personal purposes, it does not involve compromising the quality of legal services provided to clients, nor does it involve any misconduct which is so "immoral, venal, corrupt or criminal as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession." *In re Templeton*, 99 N.J. 365, 376 (1985). It does involve, however, a hardworking, caring and talented attorney, whose fault was that at a time when his life was crumbling down around him, he negligently attended to the accounting portion of his practice, while providing good legal services to his clients.

As will be shown, Respondent should not be disbarred as: (1) the Office of Attorney Ethics (OAE) failed to meet its burden of proof; (2) *in re Noonan*, 102 N.J. 157 (1986) controls this case for negligence, not *In re Wilson*, 81 N.J. 451 (1979); (3) Respondent's right to due process has been violated; and (4) If any penalty is imposed, the Court should consider all mitigating factors.

STATEMENT OF THE CASE

The within matter involves a ten count Complaint brought by the Office of Attorney Ethics. Following the initial Complaint, there was a First Amended Complaint, and a Second Amended Complaint. All these Complaints were in turn answered by the Respondent, John M. Skevin, Esq. The Second Amended Complaint maintained all counts contained in the initial Complaint and the Amended

Complaint. The following charges have been made.

Count One—Dodd

In the Dodd case, certain ethical violations are alleged regarding a real estate matter handled for Mrs. Dodd by Mr. Skevin. Mr. Skevin testified that he had a prior relationship with both Mr. and Mrs. Dodd, who were active in the real estate market in the Hackensack area, and who brought real estate investment opportunities to Mr. Skevin's attention.

At the closing of the subject premises known as 409-415 Main Street, Hackensack, New Jersey, Mr. Skevin held $35,000.00 in escrow pending the settlement of certain judgments and liens on the property. The evidence and testimony are quite clear that he released $20,000.00 to the Seller on April 15, 1982 (approximately two weeks after the closing), when he was satisfied that the balance being held was sufficient to cover the liens and judgments involved. He did not obtain the approval of the title company because it was not required. When he determined the amounts owed to the State of New Jersey and the Internal Revenue Service for taxes, he paid off both liens and retained an additional amount to cover any liens which had not yet been resolved. (see rider to closing statement, Exhibit C-23L indicating that 1980 IRS Return had not been filed and therefore tax liability was not yet determined).

Without Mr. Skevin's knowledge, the Dodds had purchased the property intending to "flip it" through a contemporaneous sale. The sale transaction was handled by another attorney, Harvey Anger, Esq., who eventually contacted Mr. Skevin to determine the balance of the monies held in escrow for the Dodds. While Mr. Skevin

was proceeding in an orderly fashion to discharge these liens, the Dodds had to post $10,000.00 to their new Buyer to cover these new liens. Mr. Skevin eventually arranged with Mr. Anger for the transfer of the escrow funds in the amount of $7,654.91 after satisfying the outstanding tax.

Respondent contends that the facts of this case do not give rise to an ethical violation. The Dodd matter raises questions of practice, and those in turn involve questions of judgment. Mr. Skevin was conservative in discharging his duties as escrow agent, ensuring that all of the liens were properly paid and discharged, and holding a reasonable buffer to ensure that he had sufficient funds to discharge the liens. He did not hold an excessive amount of money, nor did he leave his account deficient. He did not need the consent of any other party to release the funds as is evident by the closing statement and attached rider which set forth the terms and conditions of the escrow. The rider specificaly says "John M. Skevin, Esq. shall hold the sum of $35,000.00 in escrow at the time of the closing of title pending settlement of the following:" and then goes on to list the judgments and liens which were known to the parties at the time of closing as well as those which had not yet been determined, such as the tax on the 1980 IRS return. (Exhibit C-23-6).

The complaint also indicates that the deed was not recorded until May 7, 1982 and the purchase money mortgage not recorded until June 4, 1982. Mr. Skevin explained that he employed a secretary who was experienced in real estate closings and who routinely recorded documents in a timely fashion. As he was preoccupied with medical problems and hospitalized shortly after the closing, he as-

sumed that the proper documents were recorded. When Mr. Dodd called to his attention that the deed was not recorded on or about May 7, 1982, he immediately instructed his secretary to do so.

A month later he learned that she had failed to record the purchase money mortgage. He immediately made sure it was taken care of. He speculates that the secretary's lack of familiarity with a purchase money mortgage caused her to fail to recognize it as a recordable document. All of her other closings involved bank mortgages with specific documents and directions from the bank, whereas the purchase money mortgage in this transaction was different since there was no bank involved.

In the report rendered by the Special Master on March 12, 1986, Judge Herbert found that the delay in recording documents for the Dodd closing was not a basis for disciplinary action. Further, he found that proof was lacking that Mr. Skevin unethically caused Mrs. Dodd to participate with her grantee and her grantee's title company in a $10,000 agreement. Payments made by Mr. Skevin as escrow agent were also found to be justified. The Special Master further found that Mr. Skevin improperly used certain monies from his trust account in violation of DR 9-102. (Report of Special Master, March 12, 1986, p. 7-10). It is unclear if the Disciplinary Review Board adopted each and every one of these findings, as the DRB Report merely sets forth Judge Herbert's findings. (DRB Report, May 23, 1986, p.4).

Respondent contends that the Office of Attorney Ethics (hereinafter referred to as OAE) has not met its burden of producing clear and convincing evidence that Mr. Skevin had committed any ethical violation, and there-

fore, based upon the foregoing, he respectfully requests that The Court dismiss this count of the Complaint.

Count Two—Schrader

In the Schrader matter, several facts are alleged to be ethical violations which Respondent claims are not. All of the ethical violations alleged by the father, James Schrader, have been dismissed by the District Ethics Committee and the Disciplinary Review Board, and Fee claims in dispute were decided by the fee Arbitration Committee in Bergen County in favor of Mr. Skevin, awarding him $11,473.55, (Exhibit M-1), the only deduction being approximately $2,300, which the Committee determined to be the obligation of John Schrader. James Schrader filed an appeal, and the Fee Arbitration Committee's decision was upheld.

The essence of this complaint revolves around promises by John Schrader to compensate Mr. Skevin for legal services performed for his parents as well as himself in cases other than *Schrader v. D'amore*. The Schraders are a litigious family, generating more than one dozen law suits in the few years in which they were represented by Mr. Skevin. Some of them were municipal court actions involving disputes with neighbors, and others were significant actions with potentially dire consequences. They were faced with a foreclosure on their home from which they were saved by Mr. Skevin, and a $611,000.00 judgment in the *Sunstar* suit which Mr. Skevin eventually settled without the Schraders having to pay any money. The results in *D'amore* were also extraordinary as the defendant had only $10,000 of insurance coverage. Mr. Skevin's efforts put together a $250,000 settlement from parties whose involvement in the accident was indirect.

This Court should also be mindful of the public vendetta being carried out by the Schraders against Mr. Skevin which has caused him irreparable harm. As evidenced in Exhibit R-1, they have violated the confidentiality of these ethics proceedings by discussing them openly in an August 26, 1984 New York Times article authored by reporter Albert J. Parisi. Since these proceedings commenced, numerous articles about this case have appeared, including, but not limited to, articles in the following papers on the following dates: *The Star Ledger,* June 8, 1984; *The New York Times,* August 26, 1984; *The Bergen Record,* August 13, 1985; *The Star Ledger,* May 6, 1986; *The Star Ledger,* May 31, 1986; *The Bergen Record,* June 1, 1986; *The New Jersey Law Journal,* June 5, 1986; and *The Star Ledger,* June 22, 1986 (All articles Attached as Exhibit A to the August 6, 1986 Affidavit of Mr. Skevin, and also attached hereto). Most of these articles appeared prior to the date this matter was set for oral argument before the Supreme Court (by Order to Show Cause dated May 29, 1986) and contained confidential information and/or interviews with people who were not permitted to speak about this matter, particularly the Schraders. This case has also received television coverage, as set forth in Mr. Skevin's affidavit.

There is a strong suspicion that the Schraders were also involved in the production and distribution of a scurilous leaflet which is also made part of Exhibit R-1 and which has been circulated in Hackensack, the City in which Mr. Skevin resides with his family and where he practices. Fairness and justice would dictate that those who so eggregiously violate the confidentiality of these proceedings should somehow not be rewarded by a decision or penalty

against Mr. Skevin. However, the facts of the case and the evidence before the Court more than amply justify a decision that there has been no ethical violation alleged in Count Two of the complaint.

One of the violations alleged is that Mr. Skevin advanced funds to John Schrader before collecting any monies in settlement of the *D'amore* case. Mr. Skevin acknowledges having advanced $9,050.00 to John Schrader from August 19, 1982 to November 19, 1982 (see Exhibit R-7), and has testified that he believes he was advancing these monies from his own personal funds which he had deposited into the trust account.

The loans were clearly an act of charity. John Schrader had suffered a serious accident which resulted in the amputation of one leg. He became estranged from his family when they disapproved of his marriage, throwing him, his new wife and her child of a previous marriage out into the street. Mr. Schrader was unemployed, had no funds, was living in a motel in North Bergen in the cold of winter, unable to feed or care for his family. Mr. Skevin, being a charitable and sensitive human being, responded to the pleas of John Schrader, and advanced funds to him to be repaid from any recovery in the *D'amore* case. Some of the loans were made after a settlement was struck. (see Exhibits R-6H, I and K).

Another allegation involves a claim that Mr. Skevin failed to provide an accounting and payment of monies due to John Schrader from the aforementioned negligence action. The evidence and testimony indicates that although there was no formal accounting until April 20, 1983 as explained below, there were on-going, significant com-

munications with Mr. Schrader which Mr. Skevin reasonably believed were keeping him informed. Mr. Skevin's testimony and the Affidavit of Jean A. Fostedt demonstrate that John Schrader promptly came to Mr. Skevin's office upon receipt of settlement checks to receive his share. Prior to the settlement, while Schrader was hospitalized from June 20, 1979 to December 22, 1979, invoices and copies of cover letters for disbursements were sent to his parents, Mr. and Mrs. James Schrader. (see Exhibit R-8).

There was obvious confusion since John Schrader lived with his parents at the outset of the case and later separated from them, which could readily explain the mistaken distribution of copies of correspondence intending to keep him informed.

In any event, on April 20, 1983, Mr. Skevin sent to John Schrader a full accounting of what had been received and disbursed in the *D'amore* case, and what Mr. Skevin had taken as payment for various other cases pursuant to his agreement with the Schrader family, including John. (See Exhibit R-15). Mr. Skevin explained that the delay was caused by the time required to go through each of these files and compute the fees and disbursements. His behavior was reasonable under the circumstances, and should not be construed as an ethical violation. Given the multiplicity of suits and the voluminous filed described by Mr. Skevin, providing a final accounting on April 20 after making his last disbursement on January 25 was not an unreasonable delay.

In any event, all of John Schrader's claims against Mr. Skevin were finally settled on August 3, 1983 by the

$14,000.00 payment to Schrader and the exchange of releases between the parties. It is important to note that Mr. Schrader was represented by counsel, Eugene Callahan, Esq., and the release clearly covers any and all claims for proceeds due Mr. Schrader from the *D'amore* case and any claims contained in the ethics complaint against John Skevin which is the subject of this count. (Report of Special Master, March 12, 1986, p. 16).

Another allegation contained within this Count involves John Skevin signing the name of John Schrader to a check issued by the Superior Court pursuant to the Order of Judge Benedict Lucchi in the amount of $59,179.37. Said Order provided that the monies deposited with the Court by one of the defendants was to be made payable to John M. Skevin, an attorney for John Schrader. Due to a clerical error, the check was made payable to John Schrader. Mr. Skevin admits signing John Schrader's name with John Schrader's authorization, but Mr. Schrader denies giving such authorization. Since the check was to have been made payable to Mr. Skevin, he could have returned same to the Clerk of the Superior Court to have the same replaced with a check as per the Order of Judge Lucchi, but this would have delayed disbursement of the proceeds.

The facts of the case would tend to support Mr. Skevin's position. As evidenced by Exhibit R-8, Mr. Schrader was anxious for receipt of funds and asked that Jean Fostvedt call him whenever she received a draft so that he could arrange to have his share picked up, rather than waiting for it to be mailed to him.

Mr. Skevin's testimony that John Schrader was disabled on that particular day and authorized him to sign

his name and deposit the check is perfectly credible. The fact that John Schrader would occasionally be disabled and unable to come to the office is reasonable, given the magnitude of his injury. His desire to receive funds rapidly makes it logical to expect that he would authorize Mr. Skevin to sign his name to deposit the funds so that Mr. Skevin could in turn draw a check and send it to him. As evidenced by Exhibit R-7, Mr. Skevin sent Mr. Schrader a check in the amount of $15,000.00 on January 12, 1983, just five (5) days after it was issued by the Superior Court, approximately the minimum time necessary for a check to be deposited and cleared before funds could be disbursed against it from the trust account.

Another allegation in this Count involves Respondent's withdrawal from his trust account of $38,500.00 prior to November 22, 1982 by a series of nine (9) checks which were designated as partial fees or costs in the negligence action. The complaint further alleges that the withdrawals were without the apparent consent of any other client of the Respondent. Mr. Skevin testified that he made these advances from what he believed to be his own personal funds, and expected to reimburse himself from the proceeds to be received within a short period of time from the settlement already struck in the *D'amore* case. The evidence introduced by the OAE supports this position and is reflected in Exhibits C-24E through M, all of which were made in November, 1982, after the settlement was struck in Court and a few days before the receipt of the first check on November 22, 1982.

Although this is a questionable procedure, it is not a violation of disciplinary rules to advance your own funds

to yourself, which is what Mr. Skevin believed he was doing.

Respondent admits that there was no written agreement between himself and the Schraders for payment of fees for other law suits from the proceeds of the negligence action. However, that matter has now been settled between Mr. Skevin and John Schrader as set forth in Paragraph 22 of the Stipulation of Facts (See J-1). The claims between Mr. Skevin and Mr. and Mrs. James Schrader went before the Fee Arbitration Committee, which awarded $11,473.55 to Mr. Skevin. (Exhibit M-1).

The Special Master concluded that loans to Schrader constituted unethical conduct for which a private reprimand would be adequate discipline. The Special Master also noted that the deposit of Respondent's personal funds in his trust account was contrary to DR 9-102(A), withdrawal of funds prior to settlement was a violation of DR 9-102 (A) (2), maintenance of complete records in compliance with DR 9-102 (B) (3) was not followed, and proper record keeping in compliance with DR 9-102 (C) was not maintained. (Report of Special Master, March 12, 1986, p. 19-20). The report of the Disciplinary Review Board reiterated these findings, without commenting on their validity. (DRB Report, May 23, 1986, p. 7).

Based upon the foregoing, Count Two of the Ethics Complaint should be dismissed as the OAE has not proven clearly and convincingly that Mr. Skevin is guilty of any ethical violation.

Count Three—Onello

The facts of this Count involve a real estate transaction wherein Mr. Skevin was a partner with Joseph Onello

and also was the attorney representing the partnership in the purchase of a store known as 116-122 Main Street, Hackensack, New Jersey. At the closing on March 5, 1982, Respondent received and held the sum of $10,000.00 in his trust account as escrow agent for the purpose of satisfying, *inter alia* alleged franchise taxes due from the sellers to the State of New Jersey. As is evidenced by the closing statement, Exhibit C-25A, Mr. Skevin had a responsibility to see that the sellers satisfied payment of the franchise taxes. But, it was quite clear that the responsibility for payment was on the sellers. This appears to be reflected in the correspondence between Joann Onello, Esq. and Mr. Skevin's Associate on March 23, 1983. (see Exhibit C-25I).

As indicated in the Stipulation, Mr. Onello bought out Mr. Skevin's interest shortly after the closing. He had difficulty in transferring title a year later when he was represented by his daughter, but that was not the fault of Mr. Skevin. The fact that the sellers had not yet discharged the liens was beyond Mr. Skevin's control. It was not until October 10, 1983 that Mr. Skevin received adequate notice permitting him to release his funds when he received a letter from James E. Mackevich. (see Exhibit R-16).

There were admittedly problems in communication during that year between the Respondent and Mr. Onello, but the Respondent thought he was discharging his responsibility by communicating with Mr. Onello's daughter. Mr. Skevin's position is supported by Exhibit C-25I. These problems in communications gave rise to Mr. Onello's filing of his ethics complaint on April 29, 1983, but he obviously regretted that act when he withdrew the complaint one month later on June 1, 1983. (see Exhibit R-17).

The facts of this Count demonstrate a misunderstanding between business partners and a lack of understanding on the part of Mr. Onello as to the duties and responsibilities of an attorney when he acts as an escrow agent. Mr. Skevin had the obligation of holding certain documents as well as funds in escrow until certain conditions were satisfied, and Mr. Onello's impatience to the contrary, Mr. Skevin appears to have adequately discharged his fiduciary responsibilities. There appears to be no basis for a finding that there was an ethical violation on the part of Mr. Skevin with regard to Count Three, and the Count should be dismissed.

Judge Herbert held that "[t]he Third Count of the Amended Complaint, incorporated by reference as Count Three of the Second Amended Complaint, should be dismissed. (Report of Special Master, March 12, 1986, p. 22). The Onello matter was also covered by Count Four as well, and the Special Master concluded that money held in the escrow fund was used for purposes other than those for which it was intended. (Report of Special Master, March 12, 1986, p. 23; DRB Report, May 23, 1986, p. 8).

Count Seven—Santana

The Santana case is another matter involving Mr. Skevin's extraordinary generosity and caring for his fellow man. Mr. Santana, a young man of Puerto Rican descent, was a stranger in this country who was without funds, food, or shelter. Mr. Skevin responded to his desparate situation by lending him money, and as Mr. Skevin testified, if he had not recovered anything for Mr. Santana in the negligence action, he would have forgiven the loan. ("T105-24" through "T106-5", 7/12/85).

Mr. Skevin was not the attorney of record, the matter being handled by another attorney in New York where the accident occurred. Since DR5-103 only applies to attorneys while representing a client in connection with pending litigation, it's questionable whether the facts of this case even apply to Mr. Skevin, who was the referring attorney and not the attorney of record.

Here again, as in the Schrader matter, Mr. Skevin should not be penalized for his acts of charity by being cited for an ethical violation, and the Court should hold in Mr. Skevin's favor, and dismiss this Count.

Both the Special Master and the Disciplinary Review Board concluded these actions violated DR5-103 (B), and the DRB did not contradict the Special Master's conclusion that private reprimand would be adequate discipline for this conduct. Moreover, no trust account funds were involved. (Report of Special Master, March 12, 1986, p. 29; DRB Report, May 23, 1986, p. 8).

Count Eight—Ferraro and Direnzo

The gravaman of this Count is that the Respondent failed to advise Ms. Ferraro that she had the opportunity to retain him on either an hourly basis or a contingency basis. She had filed an ethics complaint against him alleging misrepresentation and improper withdrawal as counsel. This matter was heard by the District II-B Ethics Committee, which dismissed all charges.

Mr. Skevin testified that Ms. Ferraro was a CETA worker in the Lodi Municipal Building working for minimum wage. He knew her through his political contacts with the elected officials in Lodi, Mr. Skevin being the State Senator representing that town.

Mr. Skevin further testified that he never undertook representation of Ms. Ferraro, as he considered her allegations frivolous and advised her that she did not have a cause of action which would permit him to file a complaint.

In the *Direnzo* matter, we have a similar set of facts. The Direnzos obviously could not afford to pay an hourly charge, and talking to them about the alternative of a contingency fee versus an hourly charge was a complete waste of time.

The OAE has failed to sustain the burden of providing clear and convincing evidence to the court to support the allegations regarding Ferraro and Direnzo, and clearly that the allegations in Count Eight, paragraphs 1 through 6, involving both Ferraro and Direnzo were de minimus. The Special Master concluded that Count Eight of the Second Amended Complaint should be dismissed. The DRB did not contradict this conclusion. (Report, Special Master, March 12, 1986, p. 29).

Count Eight—Brennan vs. A & P

This matter appears settled as Mr. Louis Brief rechecked the calculations made by the OAE in Exhibit C-32W and found that the amount paid by Mr. Skevin to the Brennans in the aforementioned matter was in fact correct. (See Exhibit C-32-X).

Mr. Skevin testified that he and his accountant went back and recalculated the accuracy of fees taken in cases raised by the Disciplinary Review Board, and where they found errors corrections were made. This was one of those cases, but Mr. Skevin testified that the errors were

inadvertent. As explained above, Count Eight was dismissed.

Count Eight—Gruia vs. Buccola

The testimony in this matter is not clear. The OAE provided calculations showing an overcharge. Mr. Skevin's accountant, Bruce Butzel, has also reviewed the figures, and is in agreement regarding the overcharge but disagrees as to the amount. All monies owed have been sent to the Gruias. The Court should not that there was an initial check on the calculation of the fees made in May 1984, and as a result, an error was discovered. Mr. Skevin sent Mrs. Gruia a check for $668.02 to correct the error on May 16, 1984. A copy of the cover letter and check have been submitted to the Court; it was marked into evidence as Exhibit R-29. As explained above, Count Eight was dismissed.

Count Nine—Lieb

The allegations contained in Count Nine, Paragraph 2 involve the dishonoring of checks on two occasions by a bank drawn on Mr. Skevin's general business account. Since an overdraft on a general business account is not an ethical violation, this Count should be dismissed.

Count Nine—Wicks

The allegations in Count Nine—Paragraph 13 involve funds the Respondent was holding in the Matter of the Estate of Wicks. A check drawn by Mr. Skevin was returned for insufficient funds, and he replaced it, satisfactorily. The OAE was unable to provide proof that the check was drawn on a trust account, and therefore, did not meet its burden of providing clear and convincing evi-

dence that there was a violation of any ethical rule. Respondent moved to dismiss this Count on the aforementioned basis, and Judge Herbert granted Respondent's motion and dismissed Paragraph 13 of Count Nine.

At the hearing, items (7) through (11) of paragraph one of Count Nine were dismissed, as were paragraphs 8 through 12. (Report, Special Master, March 12, 1986, p. 30). The DRB did not address this point.

Counts Four and Six: Missappropriation and Comingling

Count Four alleges that the Respondent knowingly misappropriated clients' trust funds in 1982 and 1983. The OAE alleges a misappropriation totalling $181,080.00 (Count Four, paragraph 4), and that Respondent was "out of trust $147,914.08 as of December 31, 1982 and $15,741.89 as of December 31, 1983". (Count Four, paragraph 5). The OAE has failed to present clear and convincing evidence that Respondent's actions were done knowingly and intentionally, nor did they prove the allegations in paragraphs 4 or 5.

The facts amply prove that the Respondent failed to employ proper bookkeeping procedures resulting in substantial mistakes. However, the record is devoid of clear and convincing evidence that he knowingly and intentionally took clients' trust funds for his own use. He believed that he had sufficient personal funds to cover advances made to himself (see Exhibit C-10) and relied upon his bookkeeper or the bank to advise him if there were insufficient funds.

The bookkeeper, on the other hand, was doing all she could do to keep up her secretarial and bookkeeping duties as the practice expanded, and it appears that she per-

formed her duties without consulting Mr. Skevin so long as checks were not being returned by the bank. In short, she delivered checks to Mr. Skevin for his signature, upon his request, and he signed them. He believed that there were proper funds to cover these checks, and she did nothing to contradict that belief.

It is easy in retrospect to analyze the facts and decide that such a "hodgepodge" bookkeeping system could not have gone on for two years without the Respondent knowing what was happening; however, as we analyze the testimony and evidence in the record, it becomes easier to understand and Mr. Skevin's testimony becomes more credible.

First let's look at the testimony of the OAE's main witness, Louis Brief, CPA. His primary analysis is embodied in Exhibit C-8. That document is offered, *inter alia,* to prove the allegations in Paragraph 5, Count Four, that Respondent was out of trust $147,914.08; however, Mr. Brief testified that Exhibit A-1 attached to C-8 does demonstrate that Respondent is not out of trust. Instead, it shows a debit balance of that amount which Mr. Brief described as being "overdrawn" in Respondent's checking account.

Even the accuracy of that testimony is subject to serious question. For example, in Exhibit A-1 attached to C-8, we see a debit balance of $1,334.00 for the case of *K. Colondo v. Rennie Metal.* According to Mr. Brief's testimony, this means that Mr. Skevin wrote checks exceeding deposits by that amount. If we look at the underlying documentation, that does not appear to be the case.

The ledger sheet showed a balance at the beginning of 1982 of $12,784.00 with two disbursements, check number

807 on February 2, 1982 to Royal Insurance in the amount of $10,984.00 and check number 808 on February 2, 1982 to Excelsior Insurance Company in the amount of $1,800.00 for a total of $12,784.00, leaving a zero balance. (see Exhibit C-35A, C-35B).

Similarly, the *DeSimone v. DeRosa* case shows a credit balance of $104.26 but the ledger sheet shows a zero balance (see Exhibit C-37-A); *DeVito v. Shop Rite* shows a credit balance of $4,359.75 but the ledger sheet shows a zero balance (Exhibit C-38-A), as does *Dorns v. Ryan* (Exhibit C-39-A).

In the Estate of Auguste Flynn, there appears a debit balance of $578.97 from the original ledger sheet (Exhibit C-42-A), but an examination of a corrected ledger sheet (Exhibit C-42-B) indicates that a balance of $10,487.08 was not included, and the actual balance should have been zero. The same appears to be true for *Kearney v. Bergen Pines* where the original ledger sheet was in error and the correction showed a balance forward of $6,500.00 resulting in a zero balance and not a debit balance of $2,250.00 as reflected in C-8.

Kullsya v. LaRusso shows a debit balance in C-8 of $311.67, but the ledger sheet shows a zero balance. (see Exhibit C-51-A). The revised ledger sheet does show that balance (Exhibit C-51-D), but Mr. Brief testified that when he prepared C-8, he only had the original ledger sheets.

In the *matter of Lucy Quintero,* C-8 shows a debit balance of $22,048.46. If we look at the ledger sheet, we find that it is a credit balance for the same amount at the end of 1981, not 1982. (Exhibit C-68-A), and a zero balance at the end of 1982. (Exhibit C-68-B).

The ledger sheets originally used by Mr. Brief to prepare C-8 were not created contemporaneously with the transactions set forth therein. They were created retroactively in the summer of 1983 by Nancy Cloonan, Mr. Skevin's bookkeeper in response to the OAE's request. There were obvious errors, relied upon by Mr. Brief, which necessitated her redoing many of the sheets, thereby demonstrating that the factual basis for many of the allegations made by the OAE were premised upon inaccuracies.

Recognizing the substantial errors on the face of C-8, and the fact that it is based upon inaccurate underlying documents, one must conclude that the validity of C-8 is insufficient to meet the OAE's burden of clear and convincing evidence with regard to its allegations in the Complaint.

The Respondent does not deny the allegations in Count Six in that he did commingle over $1,000,000.00 of his personal funds between 1981 and 1983 in his trust account with funds of his clients. The OAE attempted to show that these funds were insufficient to cover advances Respondent made to himself in anticipation of receipt of proceeds from cases on behalf of clients; however, an analysis of Mr. Brief's testimony makes it easier to understand why Mr. Skevin believed he was covering these advances with his personal funds.

Mr. Brief took deposits from Exhibit C-10 and disbursements from Exhibit C-104A and compared them for the years 1981, 1982 and 1983. He came up with an aggregate total for 1981 through 1983 of $1,752.52 overdisbursed, (more money spent than was deposited). Upon cross-examination, Mr. Brief admitted that $87,000.00 in checks

set forth in C-104A were without notation, and he assumed they were disbursements to Mr. Skevin personally. However, he could not conclusively state whether the disbursements were for personal or business purposes. He also admitted not counting certain adjustments to C-10 for deposits actually made in 1983 which could be anywhere from $90,000.00 to $120,000.00. Assuming that the adjustment of C-10 is $90,000.00, Mr. Brief admitted that there could be as much as $175,000.00 more in deposits than disbursements over the period 1981 through 1983.

If Mr. Brief with the assistance of the OAE could arrive at such conflicting conclusions, despite the fact that he had been analyzing these accounts for almost two years, it is not too difficult to understand how Mr. Skevin could have become confused and believed that he had sufficient personal funds to cover advances to himself. (See Testimony of Louis Brief, "T3-1 et. seq.," July 15, 1985; "T2-7" to "T74-8," July 16, 1985).

The testimony of Nancy Cloonan adds some pieces to the puzzle. She corroborates Mr. Skevin's testimony that there was no accounting of the trust account, not even a monthly reconciliation of the bank statements. She did not check to see if funds were received for a specific file before preparing a check against a client account, nor did anyone else in the office perform that task.

She alone computed fees and disbursements and advised Mr. Skevin, who did not check her work. She also admitted occasionally writing out checks for payroll or bills when the Respondent was not available.

She also supported Mr. Skevin's testimony that he was out of his office each day for substantial periods of time for trials, politics, or business.

She testified that she checked the trust accounts as of March 20, 1984 and found them to be essentially in balance with all clients' claims satisfied except for a small difference of a few hundred dollars in the New Jersey Bank trust account. (see Exhibit R-19).

Regarding the bookkeeping and accounting procedures, Respondent would summarize as follows. Mr. Skevin was a single practitioner for many years. He had a small local practice in Oradell, and the level of financial activity was such that he was able to do all of his own accounting including the preparation of his tax returns. He was typical of many single practitioners throughout the state who use a "checkbook accounting method" without any additional records.

In 1973 he was elected to the State Senate, and over the next few years, his practice experienced extraordinary growth. He added associates and secretaries, but never changed the bookkeeping system or its level of sophistication.

His public position also brought new business opportunities, and he took advantage of them with his increasing assets which flowed from higher income.

He was re-elected to the Senate in 1977 and was sitting on top of the world. He was appointed Vice Chairman of the Senate Judiciary Committee and Chairman of the Cancer Study Commission. He was making more money than he ever dreamed of, and he started to build a substantial real estate portfolio.

The 1980's proved to be as bad for Mr. Skevin as the 1970's were good. He lost his bid for re-election in

1981, and just as rapidly as his practice had expanded, it started to contract. Furthermore, his business and professional problems were compounded by serious personal and health problems.

After 24 years of marriage, he separated from his wife in 1978 and went through a bitterly contested divorce culminating in 1981. The results of the divorce were devastating, as Mr. Skevin became totally estranged from three of his five children, and has not spoken to any of them from the date of his separation to the present.

He developed back problems prior to his separation due to a herniated disc which was compounded by the stress of his personal life. This condition caused him to be hospitalized for several weeks at a time and placed him under medication which included muscle relaxants and tranquilizers. We would submit to the Court that the sedation which Mr. Skevin required for this problem also contributed to his inability to focus on all aspects of his practice.

He experienced a number of other illnesses including prostatitis, skin cancer on his face (melanoma), a growth on his foot, and a cold nodule on his thyroid, necessitating the removal of two-thirds of his thyroid gland. (See Exhibits R-21, R-22, and R-23 for details). Shortly after his separation, he learned that his sister had been hospitalized and would have to be institutionalized for the same mental disorder that afflicted his mother. (His mother was institutionalized when he was quite young, and later diagnosed as a schizophrenic. She eventually died in an institution. He was raised by his father who was at work most of the time.) He became aware that this problem might be

hereditary, and this caused him substantial emotional distress. His worst fears were realized when he learned that his son, John, also suffered from the same mental disorder and is permanently unemancipated. The only other child with whom he has a relationship, his son Robert, developed serious drug problems, and Mr. Skevin had to attend to a host of conflicts with Robert who was in and out of trouble for several years during the same period of time. (Although Mr. Skevin suspected there might be more to Robert's obvious problems, he has only recently confirmed that Robert also suffers from paranoid schizophrenia.)

The devastating psychological affect all of these events had on Mr. Skevin in 1982 and 1983 are set forth in detail in the report of Dr. Allwyn J. Levine, a distinguished psychiatrist who evaluated Mr. Skevin. (see Exhibit R-24). Dr. Levin concludes that Mr. Skevin is a clinically depressed man. He states:

> It is my impression that, because of the multiplicity of intrapsychic stresses, external reality pressures generated by his profession, his elected position, his family problems, his medical problems, and his lifelong pattern of somewhat disorganized bookkeeping practices, an oversight in not keeping separate ledgers could have occurred. Granted, an accountant or bookkeeper should have picked up on these errors, but if Mr. Skevin had not read the Rules of Court and was not apprised of the new requirements for keeping separate ledger sheets, it's easy to understand how these errors could have occurred.

To further examine Mr. Skevin's intent, we offer Exhibit R-25. In the spring of 1983, Respondent received preliminary data on his 1982 Income Tax Returns from

Bruce Butzel. He was surprised and concerned at the substantial overstatement of his earnings. For the first time, he personally analyzed his fees and determined that $133,497.84 in fees were misapplied, artificially inflating his income. The results of his analysis are reflected in his May 19, 1983 letter to Bruce Butzel which is Exhibit R-25.

Mr. Skevin testified that as a result of this analysis, he became aware of a shortage in his trust account for the first time, and commenced immediate steps to restore the funds. This is significant because it occurred prior to the Office of Attorney Ethics ordering an audit of his books and records, and lends credibility to Mr. Skevin's position that he did not knowingly invade his trust account.

He later undertook independent calculation of each file with his accountant to insure that each client received what they were due. This was in fact done and confirmed by his accountant. (see Exhibit R-26).

Mr. McCormick tried to attack Respondent's credibility on the issue of commingling, but Respondent's testimony is credible on that issue. He explained that when he first started private practice in 1967, he experienced a $14,000.00 shortage in a house closing which he made up from his personal funds. To assure that he would never be out of trust, he started the practice of keeping arbitrary amounts of personal funds in his trust account as a buffer against mistakes.

When asked directly whether he ever knowingly used clients' trust funds, he categorically denied ever doing so. The OAE has presented no evidence or testimony to refute that clear testimony by the Respondent. In fact, the OAE

admitted before the DRB that it could not prove Respondent knowingly misappropriated funds. ("T32-25" through "T35-25", April 16, 1986).

In deciding this matter, Respondent believes the Court must consider all aspects of his performance. He has offered into evidence an Affidavit of Raymond F. Flood, Esq. dated July 18, 1985, (Exhibit R-30), who was appointed by the Supreme Court to serve as a proctor for Mr. Skevin on or about July 20, 1984. During the past year, he served as a co-signator on both his regular business and trust accounts, and supervised the general financial affairs of his practice. He was assisted in this endeavor by William Morrison, a certified public accountant, who reviewed Mr. Skevin's accounts on a monthly basis and prepared a monthly report for the Office of Attorney Ethics.

We call the Court's attention to Paragraph 6 of Mr. Flood's Affidavit wherein he concludes that "Mr. Skevin appears to be a competent professional, providing good quality legal services to his clients. Mr. Skevin's legal files appear to be well organized and he obtains good results for his clients which primarily involve negligence actions." We submit to the Court that this has been true throughout Mr. Skevin's practice including the years 1981 through 1983. Although he was derelict in his bookkeeping practices, he did not compromise the quality of legal services provided to his clients, including the Schraders, who enjoyed the benefit of his experience, and obtained good results. This continued to be true over this past year when he was subjected to enormous pressure due to unfair and improper publicity surrounding this matter

which was supposed to be confidential, which publicity has had a devastating effect on his practice.

The publicity has also made him a target for several disgruntled former clients and business associates who sought to take unfair advantage of Mr. Skevin in his current predicament. A pattern has developed where they go to the newspapers first to put pressure on him to settle for more than he would otherwise be willing. Because he was a public figure, the newspapers appear ready and willing to print virtually any story involving his predicament. Needless to say this has caused enormous emotional distress and anguish for him and his family, as set forth in Mr. Skevin's Affidavit of August 6, 1986.

There is an additional policy issue which should be addressed by this Court. Mr. Skevin testified that he never received accounting training in law school or subsequently. There were no courses offered on how to keep a trust account, and his experience is typical of most lawyers. Our State does not require such courses to be taught in law schools, it is not tested on the Bar Exam, it is not taught in the Skills and Methods courses required for licensure, nor is it required as part of the Continued Legal Education program in this State. (see Exhibit R-27). Only recently has the New Jersey Institute for Continued Legal Education offered materials on trust fund accounting in their skills training course. (see Exhibit R-28).

It hardly seems fair for the legal system of our State to provide no training and then deal harshly with those who make mistakes.

POINT I

DISBARMENT IS NOT AN APPROPRIATE REMEDY IN THE CASE AT BAR.

A. *The Wilson Standard If Knowing Misappropriation Has Not Been Met By Clear and Convincing Evidence.*

The landmark case of *In re Wilson,* 81 N.J. 451 (1979), put forth the maxim that in all attorney disciplinary cases where "knowing" misappropriation is proven, the result will almost invariably be disbarment. *Id.* at 453; *In re Noonan,* 102 N.J. 157 (1986). The knowing misappropriation, however, must be established by clear and convincing evidence. *In re Rockoff,* 66 N.J. 394 (1975); *In re Gross,* 67 N.J. 419 (1975).

This standard of clear and convincing evidence has been found to lie somewhere below the "beyond the reasonable doubt" standard of criminal cases yet, above the "preponderance of the evidence" standard of most civil cases. *See, In re Pennica,* 36 N.J. 401, 419 (1962).

The reason for this higher standard is because of what is at stake in disciplinary proceedings. An adverse finding will lead to dire consequences, *Pennica,* 36 N.J. at 419, ranging from loss of reputation to the loss of the attorney's license to earn a living. *See, In re Arndt,* 67 N.J. 432 (1975) (Reasoning that loss of driver's license seriously affects driver's livelihood). This Court, recognizing the clear and convincing standard in *In re Sears,* 71 N.J. 175 (1976), stated that:

> This high standard emphasizes the reluctance which should characterize a decision to impose a disciplinary sanction and the serious consequences which attend such a decision. As a practical matter, such a decision

> limits, if it does not preclude, an attorney's opportunity to practice his chosen profession. We should impose such a restriction only after careful deliberation and only in circumstances which clearly warrant it.

Id. at 197-198.

Similarly, the decision to charge an attorney with knowing misappropriation (which, according to *Wilson,* invariably leads to disbarment) is akin to charging him with a crime. *In re Fleischer, Schultz and Schwimer,* D-11/12/13, slip op. at 10 (dissent) (Supreme Court of N.J. May 28, 1986) (O'Hern, dissenting); *Erdmann v. Stevens,* 458 F. 2d 1205 (2d Cir. 1972), *cert. denied,* 409 U.S. 889, 93 S.Ct. 126, 34 L. Ed. 2d 147 (1972). If disbarment results, the attorney will be permanently deprived of his right to practice law (Reinstatement has occurred only three times in the past 100 years. *Wilson, supra,* at 460, n. 5). Such a deprivation makes disbarment analogous to criminal punishment.

Recognizing this, some courts have held that charges in a disciplinary proceeding must be established "beyond a reasonable doubt." See e.g. *Cushway v. State Bar,* 170 S.E. 2d 732, 120 Ga. App. 371 (1969), *cert. denied,* 90 S.Ct. 1705, 398 U.S. 910, 26 L. Ed. 2d 71, *reh'g denied,* 90 S.Ct. 2256, 399 U.S. 938, 26 L.Ed. 2d 810 (1969) Although these holdings are contrary to the weight of authority, which subscribes to the clear and convincing standard, *See, e.g. Rockoff, supra,* they serve to reiterate an important point: The consequences of a disbarment proceeding are extremely serious and irreversible. Therefore, to warrant disbarment, the unethical conduct—in this case, knowing misappropriation—must be proven *clearly and convincingly,* nearing the point of *beyond a reasonable doubt,* and where

doubt exists, respondent should be given the benefit of the doubt, as set forth later in subpoint B.

The Office of Attorney Ethics must prove knowing misappropriation to the Court by clear, convincing, positive proof, mere inferences and apparent conclusions will not suffice. This burden is imposed on the OAE so that the irreparable result of disbarment "shall not be reached by a mere balancing of doubts or probabilities, but by clear and unequivocal proof of facts . . . " *Lepre v. Caputo,* 131 N.J. Super. 118, 124 (Law Div. 1974) (Discussing the clear and convincing standard in a proceeding reviewing a candidate's election petition.). Therefore, the Office of Attorney Ethics' proof must be such that it

> . . . produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction without hesitancy of the truth of the precise facts in issue.

In Re Boardwalk Regency Casino License Application, 180 N.J. Super 324, 339 (App.Div. 1981), *modified,* 90 N.J. 361, (Casino Licensing Proceeding which defined clear and convincing evidence).

That is not the case here, however, as the evidence in the record clearly demonstrates. The Court need look no further than the admission of the OAE when Mr. McCormick, before the DRB, conceded that he could not prove knowing misappropriation. He stated, "I very candidly, and the Court in that instance, told him, I didn't think I could show knowing misappropriation." ("T32-22" April 16, 1986).

While that quote alone does not make it clear whether Mr. Cormick is discussing the *Noonan* case, or the case at issue, subsequent elucidation clears any discrepancy. On the next page of the transcript Mr. Sokol discusses the issue with Waldron Kraemer, Esq., a member of the DRB, and clearly states, "I think what Mr. Cormick says is exactly true. He could not prove knowing misappropriation because the facts weren't there. Nor can he prove that—what he attempts to portray as a set up, not looking, the blissful ignorance scenario, was done for that purpose." ("T34-22, to "T35-4" 4/16/86). Mr. Cormick did not object to this characterization, which also was accepted by the Board, but merely went on to explain the difference between *Noonan* and *Wilson*. ("T35-13", 4/16/86).

It is this distinction that presents the critical issue in the case at bar.

In *Noonan, supra,* the DRB found that Noonan's personal problems, i.e. alcoholism, extremely heavy workload, and marital problems, affected his ability to practice law, but he subsequently appeared to have "gotten his life together" which lead the DRB to conclude that he was now fit to continue practice under the supervision of another attorney. *Id.* at 159. The DRB further agreed with the District Ethics Committee's conclusion that there is no evidence presented indicating that the respondent intentionally defrauded his clients. This Court then went on to find that mitigating factors outweighed the offenses, concluding that respondent's misconduct was not based on dishonesty, venality or immorality, nor did his conduct lead to a conclusion that his good character and fitness have been permanently or so irretrievably lost as to warrant

disbarment. *Id.* Finally, the DRB pointed to his prior good record and reputation and contrition, and that there was full reimbursement to two clients whose funds were taken.

Just as *Noonan* stands for the proposition that disbarment is invariable, regardless of excuse, when there has been knowing misappropriation, it also stands for the proposition that when misappropriation has not been knowing, but has been negligent, disbarment is not appropriate, and some lesser penalty should be imposed. Furthermore, *Noonan* suggests that the penalty should take into consideration mitigating factors. *Noonan, supra,* at 161.

In this case, the OAE could not prove knowing misappropriation, by their own admission. A comparison of the facts of *Noonan* with those in *Skevin* make that conclusion more apparent. Noonan's marital difficulties, heavy workload, and drinking problem pale by comparison to Respondent's problems. Mr. Skevin's marital difficulties completely estranged him from three of his five children, and of the other two children, one was diagnosed as a paranoid schizophrenic making him permanently disabled, and the other was a drug addict in constant trouble. His sister was also diagnosed as a paranoid schizophrenic, confirming the fact that this was a heredital problem. (This was the disease that afflicted and eventually killed Mr. Skevin's mother while he was still an infant, and now permanently disabled his sister and sons.) In addition to his rapidly growing practice collapsing when he lost his bid for re-election in 1981, he simultaneonsly experienced significant medical problems including a debilitating back problem which often left him crippled for weeks at a time,

skin cancer, and a thyroid problem resulting in surgery to remove two-thirds of his thyroid gland.

These numerous personal tragedies suffered by Mr. Skevin support his contention that his state of mind was such that he was unaware of the shortages in his accounts. It is easy to understand that he was so distracted that he paid no attention to his accounts unless someone called a problem to his attention, which they did not.

The case of *In the Matter of Leroy C. Gipson,* D-74, slip op. (Supreme Court of N.J. June 17, 1986), recognized that external factors, such as the rigors of practice and severe psychological strain, might "bear upon respondent's ability to formulate the state of mind necessary to encompass a knowing misappropriation of funds . . . ". In that case, the Court implied that judgment of criminal conviction was proof positive of the necessary state of mind to find knowing misappropriation. *Gipson,* slip op. at 3. In this case, however, there is no criminal conviction to foreclose the consideration of these factors as evidence that Mr. Skevin could have been distracted to the point where he did not knowingly misappropriate funds. Any reasonable analysis of these facts compared to *Noonan* would lead one to conclude that the distractions on Skevin were far greater, making his lack of knowledge for his acts more credible.

Furthermore, although Respondent suffered staggering tragedies, he continued to provide quality legal services for his clients. The respondent in *Noonan* did not, yet the Court did not disbar him. By comparison, Mr. Skevin's only failure was in the bookkeeping aspect of his practice.

This Court has held that "it is the mere act of taking your client's money knowing that you have no authority

to do so that requires disbarment". *Noonan, supra* at 160. Skevin has produced credible evidence that he did not know that he was taking his clients' money. Despite the fact that the balances were oftimes low, his course of conduct over several years of depositing his own personal funds and combining with trust funds to insure proper balances, and the absence of notice of deficiencies from his bank, is sufficient to support his allegations that he did not know. The OAE produced no evidence of the contrary, nor could they disprove this long term course of conduct.

The fact that he experienced a trust account outage when he first started the practice in 1967, and thereafter maintained the practice of depositing personal funds in his trust account, lends greater credibility to his position.

In summary, if the respondent in *Noonan* did not knowingly take clients' trust funds, neither did Skevin, because the weight of evidence in support of Skevin's position is greater than that in *Noonan.*

Contrary to the analysis set forth in *Noonan,* the DRB in Skevin's case stated that, "professed ignorance . . . will, in the future, be viewed skeptically as an excuse for imperiling the integrity of client trust funds." (DRB Report, May 23, 1986, p. 20). If the reasoning of the DRB is followed, it will represent a substantial departure from current law, and a reckless disregard for the due process rights of attorneys who come before them for discipline.

The DRB wants to create a presumption of guilt because "professed ignorance" could be used as a convenient excuse by attorneys to avoid being held as *knowingly* misappropriating trust funds; however, the law provides

that the burden is on the OAE to prove knowing misappropriation by clear and convincing evidence; i.e. the attorney is innocent until proven guilty. *R.* 1:20-11(g).

Furthermore, the DRB's position that it would be difficult to analyze the facts of each case to prove knowing misappropriation is a virtual indictment of our judicial system and an abandonment of their responsibilities. Anglo-Saxon Jurisprudence has long recognized gross negligence as a distinct standard, *see, Coggs v. Bernard,* 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704); and New Jersey Courts have recognized the distinction between gross negligence and willful, knowing conduct. *Cohen v. Press,* 31 N.J. Super. 45, 50 (1954); *Foldi v. Jeffries,* 93 N.J. 533, 549 (1983); *Tessler & Son, Inc. v. Sonitrol Security Systems,* 203 N.J.S. 477, 484 (1985); *Accord, Draney v. Bachman,* 138 N.J.S. 503, 513 (1976); *Brogan Cadillac, etc. v. Central Jersey Bank & Trust,* 183 N.J.S. 333, 337 (1981). For the DRB to claim that they are unable to distinguish between knowing conduct and gross negligence while our Courts have been able to deal with the problem for almost 300 years, is a specious argument that should be summarily rejected by this Court.

In summary, *Wilson* requires a "knowing" use of client money as if it were the attorney's own. *Wilson, supra,* at 453. As set forth, the OAE has failed to prove Mr. Skevin's actions were "knowing" and has admitted such lack of proof. This case should therefore be judged by the standards set forth in *Noonan,* wherein the Court held that gross negligence is not sufficient grounds for disbarment. *Noonan,* 102 N.J. at 160-161. For these reasons, *Wilson* does not control and *Noonan* indicates that

if a penalty is to be imposed upon Mr. Skevin, it must be one other than disbarment.

B. *All doubts must be resolved in favor of the Respondent.*

If there is any doubt that Mr. Skevin acted without knowing he was misappropriating clients' trust funds due to the distractions he faced, that doubt must be resolved in favor of Respondent. In 1957, an attorney was accused of improperly using settlement funds. *In re White,* 24 N.J. 521 (1957). The Court reviewed all circumstances and testimony in that case and concluded that, "[a] careful examination of the testimony leaves us in doubt." *Id.* at 524. The Court held that the doubt was heightened by the respondent's record of 19 years of practice without a blemish. The Court concluded that, "Respondent is entitled to the benefit of that doubt." *Id.*

Later that same year, the Court again examined an attorney ethics proceeding. In that case, the crucial factual determination concerned what the attorney believed the value of a piece of property. *In re Quinn,* 25 N.J. 284, 291 (1957). The value of the property was the figure upon which the contingent fee in that case would be based. In evaluating the *mens rea* of the attorney, the Court held, "[t]he situation perhaps is not free from some doubt, but even so the doubt must be resolved in respondent's favor." *Id.* at 291.

It is clear from *White* and *Quinn* that any doubt as to whether Mr. Skevin acted negligently and did not knowingly misappropriate funds must be resolved in his favor. This case is more compelling than *White.* Prior to the within action, Mr. Skevin has practiced without a blemish

on his record since his admission to the bar in 1956. Moreover, he has a long record of distinguished public service. This heightens the doubt that must be resolved in his favor. *White, supra.* at 524. That he suffered staggering tragedies, that neither Respondent in *White* nor *Quinn* were subject to, casts further doubt on the accusation that his acts were knowing. These doubts must also be weighed in Respondent's favor.

C. *Disbarment is not the property penalty in the case at bar, and mitigating factors should permit Respondent to continue to practice.*

In the case at bar, in the absence of clear and convincing proof of knowing misappropriation, the penalty of disbarment should be rejected. This is what *Noonan,* as previously discussed, and other recent cases have made clear.

In re Hollendonner, 102 N.J. 21 (1985), involved an "appalling" disregard of proper record keeping procedures and the misuse of escrow funds which the Court recognized as an analagous to client trust funds, noting " . . . an attorney fund to have knowingly misused escrow funds will confront the disbarment rule of *In re Wilson* . . . " (citations omitted). However, the court did not apply the *Wilson* rule "in view of the absence of clear and convincing evidence that respondent invaded the escrow funds with the knowledge that the use of funds is improper." Instead, they imposed a one-year suspension. *Id.* at 28-29.

In re Hennessy, 93 N.J. 358 (1983), involved a finding that " . . . respondent's problem stems from flagrant

record keeping errors combined with an apparent lack of comprehension of the proper operation of an attorney's accounts." The Court independently concluded that the record did not clearly and convincingly show that respondent used the funds for his own or any improper purpose, and imposed a public reprimand. *Id.* at 360-61. In the case at bar, the OAE provided no evidence of Respondent's use of trust funds for any improper purpose.

These three recent cases, all factually similar to the case at bar, evidence that knowing misappropriation must be clearly and convincingly established to warrant the penalty of disbarment, a sanction so severe that it must only be

> . . . reserved for the case in which the misconduct of an attorney is so immoral, venal, corrupt or criminal as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession.

In re Templeton, 99 N.J. 365, 376 (1985).

Clearly, such is not the case in this instance. The evidence is in fact to the contrary. Should Respondent be permitted to practice law, there is every indication he would conform to the standards of the profession. As set forth in Mr. Flood's Affidavit (R-30), Mr. Skevin continues to render competent legal services to his clients. For this reason, disbarment is too severe a penalty to impose.

Recent cases have also shown that in the absence of proof of knowing misappropriation, the court is willing to consider mitigating factors in determining the appropriate disciplinary action. *In re Cornish,* 98 N.J. 500

(1985). In *Cornish*, the Court found less than knowing misappropriation, and considered as mitigating a " . . . doctor's opinion that the respondent was a basically honest person who succumbed to overwhelming psychological pressures . . ." which had impaired respondent's reasoning. *Id.* at 512. The court stated that, " . . . mitigating factors may warrant a discipline less than disbarment." *Id.* at 511.

The DRB in *Hollendonner* recognized mitigating factors in determining the appropriate sanction. Among these factors were the respondent's prior history of no disciplinary action, his admission of wrongdoing, his corrective steps to bring his records into compliance with the rules, and his activity in the community, both politically and professionally, *Hollendonner, supra*, at 27, all applicable to Mr. Skevin.

Furthermore, as set forth in the model standards for imposing lawyer sanctions *R.* 9.32, adopted by the American Bar Association in February of 1986 (ABA/BNA Lawyer's Manual on Professional Conduct 01:842):

> 9.32 Factors which may [be] considered in mitigation.
>
> Mitigating factors include:
>
> (a) Absence of a prior disciplinary record;
>
> (b) Absence of a dishonest or selfish motive;
>
> (c) Personal or emotional problems;
>
> (d) Timely good faith effort to make restitution or to rectify consequences of misconduct;
>
> (e) Full and free disclosure to Disciplinary Board or cooperative attitude toward proceedings;
>
> (f) Inexperience in the practice of law;
>
> (g) Character or reputation;

(h) Physical or mental disability or impairment;

(i) Delay in disciplinary proceedings;

(j) Interim rehabilitation;

(k) Imposition of other penalties or sanctions;

(l) Remorse;

(m) Remoteness of prior offenses.

Model Rules of Professional Conduct, Rule 9.32 (Adopted 1986).

Mr. Skevin has undergone a variety of personal tragedies as are fully set forth in the record and previously herein, which briefly include a painful divorce, alienation from his children, the commitment of his sister to a mental institution, the diagnosis of his son as being schizophrenic (indicating a hereditary family problem), drug problems by another son (later diagnosed as also being schizophrenic), removal of a portion of his thyroid, back problems, skin cancer (melanoma), and loss of his public office.

Mr. Skevin has practiced under a proctor since this court's order. As Mr. Flood's Affidavit (R-30) shows, Mr. Skevin is a competent practioner and renders high quality services to his client. There is no indication he will repeat his negligent bookkeeping practices, as his own Affidavit of August 6, 1986 shows, and he is willing to enter into a practice where he will have no financial or bookkeeping responsibilities.

Mr. Skevin has repaid all the funds due and owing to his clients and has suffered irreversable and irreparable damage professionally, financially, and personally by the premature press coverage of this case which effectively negated his ability to practice during the past two years,

and eggregiously deprived him of his right to due process. (See Point II, *infra*). As set forth in his affidavit, what was a flourishing four-man practice has now become a one-man practice with his wife as his only secretary. Additionally, he has shown himself to be repentent.

The mitigating factors in the case at bar are overwhelming, from the numerous personal tragedies suffered by Mr. Skevin, to his prior unblemished record, to his subsequent compliance with the record keeping procedures, to the damages he has already suffered. The failure to consider this plethora of evidence would be to unfairly ignore the particular circumstances of this case, thereby judging Mr. Skevin without regard to the real-life factors which affected his conduct. These factors were explained in the affidavit of Dr. Levine (Exhibit R-24).

The facts of this case call for a lesser penalty than disbarment, and taking mitigating factors into consideration, Mr. Skevin should be allowed to continue to practice.

POINT II

THE VIOLATIONS OF THE CONFIDENTIALITY RULE ARE VIOLATIONS OF MR. SKEVIN'S RIGHT TO DUE PROCESS AND SUCH A BLATANT AFFRONT TO THE INTEGRITY OF THE COURT, THA HIS CASE SHOULD BE DISMISSED OR ANY PENALTY IMPOSED MITIGATED.

(Not considered below)

Courts across the United States differ in their views as to whether an attorney disbarment proceeding is a criminal or a civil procedure. The New Jersey Supreme Court has held that it is neither civil nor criminal, but *sui generis*.

In re Logan, 70 N.J. 222, 227 (1976). The Court explained at length:

> But the proceeding is not criminal in nature. It is an exercise of the summary disciplinary jurisdiction of this Court over attorneys and counsellors, as officers of the Court. *Strong and Sons v. Mundy*, 52 N.J. Eq., 833. It is civil in character, or perhaps, it is more accurate to say it is *sui generis*, for it partakes, essentially, of an inquiry to determine whether the delinquent practioner is unworthy of the trust and confidence which attend the relationship of attorney and client. . . . The object of disciplinary proceedings is not alone to punish the attorney guilty of malpractice; the primary purposes are to compel the attorney to deal fairly and honestly with his client, and to determine whether he has, by his conduct, proved himself unfit to be entrusted with the duties and responsibility of the office of attorney. [citations omitted].

Id., quoting, In re Ries, 13 N.J.L. 559, 562 (1944); *State v. Merski*, 437 A.2d 710, 714 (N.H. 1981).

Despite that such proceedings are neither criminal nor civil, the attorney facing disbarment is entitled as a matter of right to procedural due process. *In re Ruffalo*, 390 U.S. 554, 550, 88 S.Ct. 1222, 20 L. Ed. 2d. 117, 122 (1968), *reh'g denied*, 391 U.S. 961, 88 S.Ct. 1833, 20 L. Ed. 2d. 874 (1968). See also *Logan*, supra, at 228.

In *Erdmann v. Stevens*, 458 F. 2d. 1205 (2d Cir. 1972), the Court held that under New York law, a disciplinary proceeding is more akin to a criminal action than a civil action because loss of an attorney's license represents loss of that attorney's livelihood, and threatens loss of professional reputation, even if a penalty less than disbar ment is imposed. *Id.* at 1209-10.

While New Jersey Courts do not consider disciplinary proceedings to be of a criminal nature per se,[1] the N.J. Supreme Court has held on numerous occasions that all administrative proceedings must be conducted in conformance with due process. "Administrative Hearings and contested cases must operate fairly and conform with due process principles". *In re Kallen,* 92 N.J. 14, 25, *quoting, Laba v. Newark Bd. of Educ.,* 23 N.J. 364, 382 (1957). This requires principles of basic fairness be observed and adequate procedural protections be afforded. *Id.* at 25. These rights are guaranteed by the Fifth and Fourteenth Amendments. *David v. Strelecki,* 97 N.J. Super. 360, 369, *rev'd on other grounds,* 51 N.J. 563 (1968).

While the Court often cites to the need for due process, it is a concept more easily espoused than explained. The Appellate Division has said:

> Due process in its constitutional sense is little more than a metonym for fair play. [citation omitted] It connotes fundamental fairness. Due process is an element which, when missing, produces the reaction according to that which is "shocking to the universal sense of justice." *United States v. Russell,* 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L. Ed. 2d 366 (1973).

State v. Lagnella, 144 N.J. Super. 268, 284 (1976).

In examining the standard of due process necessary in license revocation proceedings, the Court held that revoking one's drivers license affects drivers in a serious way, and may threaten their ability to earn a livelihood.

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[1]However, in *In re Fleischer, supra,* the dissenting Justice likened disbarment to a criminal proceeding due to the severity of the penalty.

Therefore, such proceedings must meet incidents of fairness underlying due process. *In re Arndt,* 67 N.J. 432, 436 (1975); *David v. June Strelecki,* 51 N.J. 563, 566 (1968). The Court has held this is so even though holding a license is a privilege rather than a right. *Bechler v. Parsekian,* 36 N.J. 242, 256-57 (1961). If proceedings involving the loss of a driver's license are subject to such a high degree of due process because they entail the possible loss of one's livelihood, then disbarment proceedings must undergo at least the same scrutiny, as disbarment inevitably affects the attorney's livelihood.

In the case at bar, numerous rights of Mr. Skevins' were violated.

A. *Mr. Skevins' Right To Privacy Was Violated.*

The Rules of the Court provide:

> All proceedings conducted and records made pursuant to *R.* 1:20 shall be confidential and shall not be disclosed to or attempted by anyone except as authorized by these Rules or as provided by the Supreme Court and as follows:
>
> (1) On the scheduling of oral argument for final discipline by the Supreme Court, in which event the recommendation of the Board that is the subject thereof, together with any briefs filed pursuant to an Order of the Court, shall remain public; . . .

R. 1:20-10 (a).

Oral argument was scheduled on May 29, 1986. However, as set forth in the affidavit of John M. Skevin, Esq., numerous articles concerning this case appeared in various New Jersey and New York papers prior to that date. Publicity was not limited to print media, as commentaries

on television also appeared. (See Affidavit of John M. Skevin, Esq., August 6, 1986).

The rule itself reads that "all proceedings conducted and records made pursuant to *R.* 1:20 shall be confidential and shall not be disclosed or attended by anyone . . ." It provides that Mr. Skevin had a right to privacy prior to any release of this information. The New York Court of Appeals has dealt with a similar issue. *Matter of Dondi,* 63 N.Y. 2d 331, 482 N.Y.S. 2d 431, 472 N.E. 2d 281 (1984). In that case, also an attorney disciplinary matter, the grievance committee obtained sealed records of a prior criminal proceeding involving that attorney. That proceeding had been terminated in the attorney's favor. The Court held that substantial damage to the attorney's right to privacy had occurred because the grievance committee had not complied with proper proceeding in obtaining those records. The Court held that the only viable remedy was to dismiss the case. *Id.,* 482 N.Y.S. at 432.

Florida has reached a like determination. Under the disciplinary rules of that state, when information concerning a confidential attorney disciplinary case is to be revealed, the respondent is given fifteen (15) days notice in which to protest the release of that information. In the *Florida Bar v. Rubin,* 362 So. 2d 12 (Fla. 1978), the disciplinary committee released that report prior to the running of the fifteen (15) days, and before the respondent had a chance to protest that release. Widespread publicity resulted, and the Court held that in a case in which the recommended penalty was a private reprimand, and the respondent had been damaged by the unwarranted publicity, the inexcusable breach on the part of the committee could only be remedied by dismissal of the case. *Id.* at 17.

Rubin is similar to the case at bar. Numerous breaches of confidentiality have taken place, as evidenced by the articles cited to earlier, and as addressed in letters dated September 3, 1985 and May 6, 1986 by Judge Herbert. (Exhibits to Affidavit of John M. Skevin, Esq., August 6, 1986). In the August 13, 1985 edition of *The Bergen Record,* (Affidavit of John M. Skevin, August 6, 1986) the OAE was quoted as saying, "I want to see this guy get what he deserves, at least in my opinion." These articles, and others listed earlier herein, resulted in much undue and painful publicity to Mr. Skevin, as set forth at length in his Affidavit. Despite that misrepresentations made by the Schraders maligned Respondent, he respected the confidentiality of these proceedings and did not defend himself. Respondent suffered damages as a result of this. It is clear, therefore, that Mr. Skevin's due process right to privacy has been blatantly violated.

Due process is so important a right, that the New Jersey Supreme Court has held that where the attorney/client privilege is violated by improper eavesdropping by public officials, dismissal of the prosecution might sometimes be necessitated. *State v. Sugar,* 84 N.J. 1, 19, (1980). The Court explained:

> In either case official intrusion would prevent defense counsel from providing constitutionally effective assistance. Because these more egregious violations do not involve the disclosure of evidence, an exclusionary remedy would be insufficient to vindicate defendant's right, deter official misconduct, or maintain judicial integrity. A dismissal of the prosecution would thus be necessary as the only means to avoid a deniel of one of the fundamental requirements of due process of law.

Id.

While the Court did not find it necessary to dismiss the case, that it would even consider doing so in a murder case shows the importance of procedural due process in the judicial system.

In the case at bar, Mr. Skevin's due process rights have been violated. The affidavit of Mr. Skevin sets forth the damages he has suffered due to this violation of his rights. Because his rights have been violated so outrageously, Mr. Skevin is entitled to some form of relief. This relief ought to take the form of either dismissal of the within action, or mitigation of penalty.

B. *Mr. Skevin's Right To a Fair Hearing and Determination Have Been Prejudiced.*

In *Landmark Communications v. Commonwealth,* 217 Va. 694, 233 S.E. 2d 120 (1977), the Virginia Supreme Court recognized that breach of the confidentiality of certain proceedings is "so contrary to the public interest that it constitutes a subtantive evil of immediate and serious peril to the orderly administration of justice, and therefore, should be punishable." 235 S.E. 2d at 127, *rev'd and remanded,* 435 U.S. 829, 98 S.Ct. 1535, 56 L. Ed. 2d 1 (1978) (The Court upheld this doctrine, but did not find clear and present danger in that case).

Likewise, the New Jersey Supreme Court has held that the State has a substantial interest in insuring the fairness of judicial proceedings. *In re Hinds,* 90 N.J. 604 (1982). Additionally, in *State v. Sugar,* the Court declared that fundamental fairness prohibits the conduct by law enforcement officials that would pervert the judicial process and turn it into a prosecutorial tool. "To

allow such conduct would erode public confidence in the impartiality and fairness of the judicial process." *Id.* at 14-15, *quoting, State v. Molnar,* 81 N.J. 475, 485 (1980).

While it is generally held that prejudice is a concern only in a jury trial, *See, e.g., In re Hinds,* 90 N.J. 604, the Court still must consider the problem herein. First, members of the DRB were not all attorneys or experienced jurists. Several of them were "lay persons". That numerous articles appeared in the newspapers urging Mr. Skevin's disbarment just prior to the DRB decision is significant. (Articles appeared on June 8, 1984; August 26, 1984; August 13, 1985; May 6, 1986; May 31, 1986; June 1, 1986; June 5, 1986; and June 22, 1986. Judge Herbert rendered his decision on March 12, 1986 and the DRB and May 23, 1986). These members of the DRB should not be evaluated in the same way as Judges or other jurists. They are lay people and are subject to the same influences as are present in a jury situation. Therefore, the improper publicity prior to the rendering of that decision made it difficult, if not impossible, for Mr. Skevin to obtain a fair review.

Secondly, a more complex and difficult analysis also indicates that Mr. Skevin cannot be given a fair review under these circumstances. The Court in *In re Wilson* indicated that one of the most important concerns of attorney disciplinary hearings is to maintain the faith of the public in the New Jersey Bar. The perceptions of the general public therefore play an important role in the Court's decisions. However, due to the improper publicity this case has received, the general public has already been persuaded that Mr. Skevin is guilty and should be disbarred, or has been disbarred. (See Affidavit of John

M. Skevin, Esq., August 6, 1986). The court is now caught between the proverbial rock and the hard place. In order to maintain public confidence, the court may feel it must disbar Mr. Skevin, whether or not he is deserving of disbarment. The publicity in this case has therefore made it impossible for Mr. Skevin to receive a fair determination and the proceeding herein ought to be dismissed.

This dismissal would advance the important policy of enforcing the integrity of the confidentiality rule. In *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966) a criminal matter, the United States Supreme Court held that: "If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but pallitives; the care lies in those remedial measures that will prevent the prejudice at its inception. The Court must take such steps by rule and regulation that will protect their processes from prejudicial outside interference."

Dismissal would also serve to advance the important policy of complainants maintaining confidentiality. As is clear from the record and recognized by Judge Herbert (See letters from Judge Herbert, September 3, 1985 and May 6, 1986, respectively Exhibits "C" and "D" of the Affidavit of John M. Skevin, Esq., August 6, 1986 and also attached hereto), the Schraders repeatedly violated the confidentiality rules, despite repeated warnings by the Office of Attorney Ethics and the DRB. (Said letters are attached for the Court's convenience).[2] Only dismissal

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[2]The logic of having a rule which permits release of the DRB report once the case is scheduled for oral argument, when

(Continued on following page)

would make it clear to other complainants that the rules of confidentiality must be respected, and the Court should deliver this message by dismissing the within matter.

———o———

CONCLUSION

FOR the reasons stated herein, Mr. Skevin should not be disbarred, all proceedings against him should be dismissed, or in the alternative, any penalty imposed upon him should be mitigated based on the facts of this case.

Respectfully submitted,

GREENSTONE & SOKOL, ESQS.

By: /s/ Leon J. Sokol

Dated: August 11, 1986

(Continued from previous page)

the DRB requests complainants to maintain confidentiality, is unclear. Respondent suggests that the Court re-evaluate Rule 1:20-10(a). There appears to be no good reason to make these facts public prior to this Court's final determination, and such undue publicity has damaged Respondent. Because he was a public figure, the press seized upon this case. As a result, Mr. Skevin's long history of public service worked against him, diminishing his ability to practice.

Supreme Court, U.S.
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APR 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1334

In The
Supreme Court of the United States
October Term, 1986

JOHN M. SKEVIN,

Petitioner,

v.

SUPREME COURT OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER'S REPLY BRIEF

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I.

THE RESPONDENT RELIES UPON AN ERRONEOUS LEGAL STANDARD IN CLAIMING THAT PETITIONER'S ISSUES NOS. 1 AND 2 WERE NOT ADEQUATELY PRESENTED TO THE COURT BELOW

INTRODUCTION

As it now stands, in New Jersey and other states that have adopted *In re Wilson,* 81 N.J. 451 (1979), an attorney with, for example, 40 years of unblemished service to the state *must* be disbarred if he or she "knowingly" misappropriates ten, twenty or thirty dollars of trust money; and "knowingly" no longer means with intent to steal or defraud. That irrational and draconic rule created in the context of a laudable effort to stem attorney corruption must be overruled by this Court before many lives, reputations and careers are ruined and this Court is saddled with the weight of those ruins.

Respondent has advanced a series of hypertechnical arguments based upon 28 U.S.C. Section 1257(3) to avoid review of New Jersey automatic disbarment rule in this Court. As explained below, such contentions lack merit.

A. The Respondent New Jersey Supreme Court Violated Petitioner's Federal Constitutional Rights After Submission Of Briefs Below; That Violation Of Rights Was Unforeseeable

In the proceedings below, the Supreme Court of New Jersey functioned in its original jurisdiction, as a trial court, deciding the legal issues involved herein *for the*

first time.[1] Short of fortune-telling, it was therefore impossible for the petitioner to fully brief issues of law raised, *for the first time,* by the New Jersey Supreme Court's decision (obviously issued *after* submission of briefs) which abandoned long-standing constitutional norms governing attorney discipline.

No court of law heard Mr. Skevin's case prior to a hearing by the Supreme Court of New Jersey. Thus legal issues were not fully developed and expounded upon prior to that Court's decision. A special master held a hearing and made *factual* findings for use by the Disciplinary Review Board ["DRB"], an intermediate body composed of lay persons and attorneys. That body adopted the factual findings of the special master and recommended disbarment. The Supreme Court of New Jersey then heard the matter *de novo* upon the record developed below and, on November 14, 1986, issued its findings of fact and, *for the first time,* conclusions of law. [Petition for Cert., App. A].

Before issuance of the opinion in this case, there was no clear indication that the New Jersey Supreme Court was prepared to completely abandon the constitutionally compelled inquiry into an attorney's character and fitness prior to disbarment, *Schware v. Board of Examiners of New Mexico,* 353 U.S. 232 (1957), or that the Court would conclusively presume corrupt intent from facts that did not involve theft or fraud.

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[1]See *In re LiVolsi,* 85 N.J. 576 (1981) ruling that "this Court's plenary constitutional authority includes *original jurisdiction* over cases involving the "disciplining of attorneys. . . ." *Id.* at 584 (Emphasis Supplied).

Indeed, in *Matter of Noonan,* 102 N.J. 157 (1986), decided a few months before the New Jersey Supreme Court's decision in this case, that Court, despite tough sounding *dictum, declined* to find knowing misappropriation and *declined* to disbar an attorney on facts remarkably similar to those presented here. Moreover, in *Matter of Noonan,* the Court, quoting the DRB report noted, in compliance with *Schware, supra,* that the attorney "had no prior ethical problems . . . had a good reputation and has admitted that his conduct transgressed the rules." *Id.* 102 N.J. at 165.

This case was the first published decision of the Supreme Court of New Jersey wherein an attorney was disbarred without meaningful inquiry into his current character and fitness to practice law and wherein *knowing* misappropriation was conclusively presumed from the bare fact that there were accounting discrepancies in a trust fund, discrepancies that never led to a client's being deprived of funds, discrepancies concededly not motivated by an intent to steal or defraud.

B. Petitioner Nevertheless Did Raise Below The Constitutional Challenges Now Urged In His Petition For Certiorari

Notwithstanding the unpredictability of the decision in this matter, counsel below managed, prior to issuance of the New Jersey Supreme Court's opinion, to divine and, albeit briefly, address the issues now presented here. As discussed at length in the Petition for Certiorari at 20 to 21, counsel below, citing *In re Arndt,* 67 N.J. 432 (1975),

a case explicitly adopting *Bell v. Burson*,[2] 2 U.S. 535 (1971), and further citing *Erdman v. Stevens*, 458 F.2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889, argued against a "presumption of guilt" [Resp. Brief, App. 42] and reminded the Court that "an attorney is innocent until proven guilty." [Resp. Brief, App. 43] To presume guilt, counsel argued, "will represent a substantial departure from current law, and a reckless disregard for the *due process rights* of attorneys who come before them [the Disciplinary Review Board] for discipline." [Resp. Brief, App. 42] (Emphasis Supplied).

In his motion for a stay of the disbarment order, petitioner's counsel submitted to the New Jersey Supreme Court a near-final draft of a motion for a stay in this Court that fully briefed the issues presented below in connection with *Schware, supra*. Annexed to this Reply Brief as Appendix A is a true copy of the pertinent argument portion of that submission which included extensive discussion of this Court's relevant decisions. Notwithstanding the foregoing submissions, the New Jersey Supreme Court stood firm on its decision to disbar the petitioner and chose not to address any of the federal issues.

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[2] *In re Arndt, supra*, holds,

> [L]icense-revocation proceedings do realistically affect drivers in a serious way, often threatening their ability to earn a livelihood, and it is settled they must meet those incidents of fairness underlying due process. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L.Ed.2d 90 (1971); *David v. Strelecki, supra* (51 N.J. at 566).

Id., 67 N.J. at 436.

C. Petitioner Meets This Court's Standard As To The Adequacy Of The Presentation Of Federal Issues Below

Where, as here, a petitioner for certiorari seeks review of a State Supreme Court decision that was issued in the original jurisdiction of that court, this Court, recognizing the difficulty of anticipating constitutional issues, has used a relaxed standard in evaluating the presentation *vel non* of federal issues below. See, e.g. *Saunders v. Shaw,* 244 U.S. 317, 320 (1917). See also, *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehney,* 281 U.S. 313, 320 (1930).

"[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 85 N. 9. Here, although it could *not* have been predicted that the Supreme Court of New Jersey would completely abandon the *Schware*-compelled character and fitness inquiry or that the New Jersey Court would transform the meaning of knowing misappropriation to include acts that do not involve corrupt intent, petitioner's counsel managed to raise the relevant issues of due process. *A fortiori,* therefore, under *Robins, supra,* (which in these circumstances would forgive a *failure* to raise federal issues below) the federal issues involved in this case were adequately presented for purposes of 28 U.S.C. Section 1257(3).

The respondent would hold the petitioner up to a severe, if not impossible, standard in determining whether

federal issues were properly presented below. It is not enough for respondent that petitioner explicitly decried a violation of "due process" resulting from the "presumption of guilt" below. The reference to "due process," respondent argues, harking back to the age of formula pleading, must be deemed to refer only to the due process clause of the New Jersey *State* Constitution. [See Resp. Brief at 9]. That contention fails because *there is no such State due process clause.* The clause cited by respondent, *but not quoted by respondent* [Resp. Brief at 9], is as follows:

> **1. Natural and unalienable rights**
>
> 1. All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.[3]

Thus, the petitioner's reference to "due process" *had* to refer to the federal constitution, since there is *no* state constitutional due process clause.

Respondent argues that absent citation and extended discussion of this Court's federal due process cases in its

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[3]Contrast the foregoing generalized description of inalienable rights to the state constitutional clause in *Miller v. Cornwall Railroad Company*, 168 U.S. 409 (1897), which provided that every person "shall have a remedy [for legal wrongs] by the *due course of laws*. *Id.* at 411. In that case, this Court concluded that there was a state due process clause and that, therefore, bare references to due process were to be construed as state, not federal, claims for purpose of 28 U.S.C. Section 1257(3). Here, there is no state constitutional language such as in *Miller*.

first brief to the New Jersey Supreme Court, and absent a specific use of the words "Fourteenth Amendment," petitioner has failed to satisfy 28 U.S.C. Section 1257(3). [Resp. Brief at 9]. Such has never been this Court's view.

No particular words need be used to raise a federal question below. *Dewey v. City of Des Moines,* 173 U.S. 193, 197-198 (1899). In *Braniff Airways v. Nebraska State Board of Eq. & A.,* 347 U.S. 590 (1954), this Court heard an appeal from a judgment of the Nebraska Supreme Court although "appellant name[d] the wrong constitutional clause [i.e., the Commerce Clause] to support its position." Though appellant's claims below were "inexplicit," this Court found his "due process issue within the clear intendment of [appellant's inexact] contention and h[e]ld such issue sufficiently presented" below. *Id.* at 599.

Clearly, issues one and two of the petition for certiorari are within the "clear intendment", *Braniff, supra,* of petitioner's claims below that the New Jersey disciplinary system violated the "due process rights of attorneys" [Resp. Brief, App. 42] with a "*presumption* of guilt" [Resp. Brief, App. 42] at odds with the rule that an "attorney is innocent until proven guilty." [Resp. Brief., App. 43]. It is precisely the conclusive *presumption* of unfitness, and the conclusive *presumption* of corrupt knowledge, that lie at the heart of issues one and two. Those issues are precisely encompassed by the phrase "presumption of guilt" contained in the brief below.

This Court has always had considerable discretion in determining whether a federal issue has been adequately presented below. In *Illinois v. Gates,* 462 U.S. 213 (1983),

this Court has observed that it even "possessed discretion to *ignore* the *failure* to raise in state court the question on which it decided the case." *Id.* at 218 (emphasis supplied) citing *Vachon v. New Hampshire,* 414 U.S. 478, 479 N.3 (1974) and *Terminiello v. Chicago,* 337 U.S. 1 (1949).

Here, discretion should be exercised to grant certiorari, notwithstanding any alleged or real lack of precision in the presentation below. The rationale underlying 28 U.S.C. Section 1257(3) will not be offended by a grant of certiorari here. That rationale—permitting state courts to entertain a federal constitutional challenge prior to this Court's review in order that the state court may save a state statute or procedure with a limiting construction, *Cardinale v. Louisiana,* 394 U.S. 437 (1969)—is not undermined here. Even had petitioner's federal issues been presented below as sharply as they have been presented here, the New Jersey Supreme Court would have dismissed those claims as meritless.[4] In its brief here, the Supreme Court of New Jersey has so characterized petitioner's claims. [Resp. Brief at 10 *et. seq.* and 17 *et. seq.*] The New Jersey Supreme Court argues here in its brief that petitioner's claims were not raised below, but raising them more precisely below would have been in vain and would have resulted only in summary dismissal of such claims.

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[4]It is noteworthy that the New Jersey Supreme Court totally ignored federal issues that it admits were fully presented below, i.e. issues arising from the breach of confidentiality. Clearly, the New Jersey Court was not prepared to address or redress any claimed deprivation of federal rights and a clearer presentation of such issues below would have been in vain.

Thus, the respondent seeks to use 28 U.S.C. Section 1257(3) in an overly technical way as a barrier to this Court's adjudication of the merits of its blanket disbarment rule.

Certiorari must be granted so that issues of national importance involved herein may be resolved and so that an approach to attorney discipline adopted by New Jersey, which is at odds with decisions of this Court, can be reversed.[5]

Respectfully submitted,

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[5] Petitioner relies upon his Petition for arguments on the merits with respect to all issues, including issue number 3. Petitioner believes it appropriate to point out that respondent has acknowledged an error in its Opposition Brief at page 19 with respect to issue number 3. There, respondent contends that the Schraeders did not breach confidentiality until *after* the evidentiary hearing below. In fact, the first *New York Times* article reflecting a breach of confidentiality appeared almost one year *before* the evidentiary hearing before the Special Master. (See Pet. App. F at 33). Petitioner hereby represents that he has been contacted by respondent who candidly concedes the chronological error on page 19 of the brief.

Appendix A

[Legal argument portion of draft motion for stay in United States Supreme Court submitted to New Jersey Supreme Court for its review in connection with petitioner's motion for a stay in the New Jersey Supreme Court]

This Court has indicated that one of the factors it will consider in deciding whether to grant a writ of certiorari is whether "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court," Supreme Court Rule 17.1(c).

Here, the New Jersey Supreme Court has embarked upon an approach to attorney discipline, now being adopted in high state courts throughout the nation, in direct conflict with decisions of this Court.

In deciding to disbar John Skevin, the New Jersey Court relied upon *In re Wilson,* 81 N.J. 451 (1979), a case in which an attorney forged a client's endorsement on a check made out to the client and literally stole the proceeds and also failed to return $23,000.00 in escrow money to a client for almost two years. There the Court ruled that in cases of knowing misappropriation of client funds, "mitigating factors will rarely override the requirement of disbarment," *id.* at 461.

In *In the Matter of Noonan,* 102 N.J. 157 (1986), a case decided just months prior to the New Jersey Court's ruling against the petitioner, the Court interpreted *In re Wilson,* supra, to mean that any invasion of trust funds

for virtually any reason will mean automatic disbarment. "It is not so" the Court ruled "that some kind of intent to defraud is required . . . *The presence or absence of 'good character and fitness,' the absence of 'dishonesty, venality, or immorality'—are all irrelevant,"* the Court declared.

In *Schware v. Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232 (1957), this Court held that a person may not be excluded from bar admission unless he lacks good character or is immoral and unfit. Ignoring such traits in evaluating bar membership, the Court held, amounts to a violation of the Due Process clause of the Fourteenth Amendment. There, this Court, having granted certiorari to review a state judgment excluding a person from bar membership, found no evidence of "moral turpitude", *id.* at 242, and found that "in the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies . . . cannot be said to raise substantial doubts about his present good moral character," *id.* at 246. Finding no evidence in the record which rationally justifies a finding that [petitioner] was morally unfit to practice law," *id.* at 247, this Court reversed and remanded the matter.

When the Supreme Court of New Jersey held that good character and fitness, as well as the absence of dishonesty, venality and immorality are all "irrelevant" to the issue of whether an attorney should be stricken from the rolls, it acted in flagrant violation of *Schware, supra.*

As discussed above, in disbarring John Skevin, the New Jersey Supreme Court, true to its *Wilson* standard,

completely ignored Mr. Skevin's lack of moral turpitude and unquestioned current fitness to serve his clients.

This Court has not hesitated to grant certiorari to correct such grievous errors. See *Konigsberg v. State Bar of California,* 353 U.S. 252 (1957) (reversing state denial of bar admission where the lower court failed to prove that petitioner was "morally unfit to practice law," *id.* at 273); See also, *Willner v. Committee on Character,* 373 U.S. 96 (1963) (on certiorari to the New York Court of Appeals reversing state denial of bar admission where petitioner was deprived of fair opportunity to prove his character and fitness); *Spevack v. Klein,* 385 U.S. 511 (1967) (on certiorari to the New York Court of Appeals reversing disbarment of attorney because he had asserted the Fifth Amendment); *In the Matter of Ruffalo,* 390 U.S. 544 (1968).

Here, this Court must grant certiorari in order to stem a nation-wide violation of attorney due process rights. For, *Wilson, supra,* is being explicitly adopted throughout the nation. See *In re Marks,* 72 A.D.2d 399, 424 N.Y.S.2d 229 (1980) citing *Wilson* at 424 N.Y.S.2d at 230; *Oklahoma Bar Association v. Raskin,* 642 P.2d 262 (Okla. 1982) citing *Wilson* at 267-68; *In re Okerman,* 310 N.W.2d 568 (Minn. 1981) citing *Wilson* at 571; *Wilson* has also been cited in unpublished decisions in Maine, Texas and the District of Columbia, Johnson, *Lawyer, Thou Shall Not Steal,* 36 Rutgers L. Rev. 454 (1984) at 486.

Another reason for granting certiorari in this matter is because a novel and substantial issue of procedural due process has been implicated by the proceedings below. This Court has already ruled that where a criminal jury trial

is infected with excessive pre-trial and trial publicity, due process requires vacation of the conviction and retrial. *Sheppard v. Maxwell,* 384 U.S. 333 (1966). This Court has recognized also that judges as well as jurors may be influenced and pressured by excessive press coverage of court proceedings. In *Pennekamp v. Florida,* 328 U.S. 331 (1946) Justice Frankfurter (concurring) wrote that "To deny that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels . . . 'Trial by newspaper' like all catch-phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country." *Id.* at 359.

This case poses the as yet unanswered question of whether 'trial by newspaper' violates the integrity of state bar disciplinary proceedings in a manner contravening the Due Process clause of the Fourteenth Amendment of the United States Constitution. Here, the Supreme Court of New Jersey conceded that it was "deeply troubled" by the "apparently deliberate breach of the confidentiality" of the proceedings against Mr. Skevin. In *Wilson, supra,* the Court frankly admitted that it sought harsh penalties for misappropriation in order to preserve its public image and to maintain "public confidence," *id.* at 81 N.J. 456. Given the press clamor for Skevin's disbarment, the Court had no choice but to disbar him. In *Matter of Dondi,* 472 N.E.2d 281 (New York 1984), New York's highest Court found a confidentiality breach in roughly analogous circumstances to violate federal due process; this Court should find likewise. See also, *Florida Bar v. Rubin,* 362 So.2d 12 (Florida 1978).